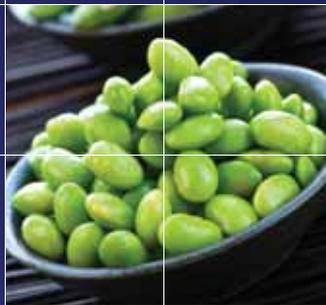




One Firm WorldwideSM



PRODUCT LAW WORLDVIEW





PRODUCT LAW WORLDVIEW

.....

TABLE OF CONTENTS

INTRODUCTION

Introduction

THE EUROPEAN UNION

The European Union's Product Liability and Safety Legislation
Product Liability Law in France
Class Actions in Europe: Reality or Myth? The Example of France
Product Liability Law in Germany
Product Liability Law in Italy
Product Liability Law in Spain
Product Liability Law in the United Kingdom

AUSTRALIA

Product Liability Law in Australia
Class Actions in Australia

ASIA

Product Liability Law in China
Product Liability Law in Japan

MEXICO

Product Liability Law in Mexico

THE UNITED STATES

Product Liability Law in the United States

INSURANCE

Product Liability Insurance Issues

CONTACT INFORMATION

List of Authors
Business and Tort Litigation (USA) Office Heads of Litigation

INTRODUCTION

As U.S. manufacturers work to increase product exports, and as global trade in manufactured goods has become a fact of life, Jones Day offers this compendium of chapters discussing product liability law in Asia, Australia, Europe, Mexico, and the United States. We cannot promise certainty in the law or procedures that a manufacturer will face in other countries, but we aim to provide the basic information that will allow manufacturers to make knowledgeable decisions about the potential liability risks and how to manage and mitigate those risks, including through insurance.

In addition to litigation risk, we aim to educate manufacturers on the extensive rules and procedures for product safety and recalls that they will need to navigate. These rules aim to prevent injury from unsafe products. The rules, particularly in Europe and recently in China, reflect administrative efforts, often directed by legislatures, to protect consumers from product hazards, and they demand the virtual elimination of risk or a high level of proven safety. They also may mandate product monitoring and a rapid response to product hazards occurring in field use.

Finally, in many countries, the risk of criminal investigations and proceedings against companies and their local executives or managers arising from defective, unsafe products is real. Therefore, the rules and procedures governing criminal liability are discussed as well.

Because of historic empire building, the need for consistent rules in international trade, and the general harmonizing principles established within the European Union that have had global influence, product manufacturers will find commonality in the substantive law of the major trading countries discussed in this compendium. At the risk of oversimplification and with the caveat that local differences exist, some general observations can be made:

- The law affecting product manufacturers arises from contract, express and implied warranties, strict liability, and negligence. Strict, no-fault liability for defective products sold to consumers is now the common rule.
- The law comes from several sources: treaties, statutes, and judge-made law. Administrative regulations are also important to consider and can establish product safety standards. Particular statutes are often in place for certain kinds of products. All sources should be consulted.
- Following the lead of the European Union, most countries now have general product safety directives separate and apart from liability law for personal injury or property damage. Those safety directives set rules and procedures that apply with the first sale of a consumer product in a country. Their goal is to prevent injury from unsafe products. The precautionary principle prevails, particularly in Europe. The safety directives also provide the guidelines for product recalls. Noncompliance can give rise to administrative fines and, in extreme cases, criminal penalties.
- Manufacturers typically have the obligation to ensure that products are safely designed and bear adequate instructions and warnings for safe use. Most countries use a “consumer expectation” test. Component-part manufacturers are similarly responsible for their products. Distributors, sellers, and retailers have fewer obligations, absent their own fault, but can be held liable when the manufacturer is not identified or is not available for suit in a country.
- Defenses to civil liability typically include, among others, statutes of limitation, the plaintiff’s fault or misuse of the product, and compliance with the state of the art of technology.
- Pretrial discovery is usually very limited in countries other than the United States.
- With respect to the countries discussed in this compendium, except for the United Kingdom and the United States, judges, not juries, hear and decide lawsuits, including (with some exceptions) criminal prosecutions. The trial typically involves the presentation of written evidence and then argument by counsel. Judges appoint experts to educate them about the product and complicated technical, scientific, and medical issues. Because cases involve little pretrial discovery and are heard before judges, they often

proceed quickly. There is greater convergence of substantive legal principles than with procedures in the United States and other countries.

- Class actions are rare outside the United States, though procedures for such aggregated claims exist. The American influence may be spreading, however, to Australia and Europe.
- Compensatory damages are available for personal injury and property damage. Damages for personal injury usually include pain and suffering beyond just out-of-pocket expenses, but awards are typically more circumscribed than those occurring in the United States. Punitive damages are either prohibited or rarely awarded.
- Manufacturers should consider the availability of insurance to cover products sold outside the United States, including recall insurance.

The individual chapters will provide an overview of each country's statutes and laws affecting the sale of products. A summary of the fundamental principles, judicial procedures, and administrative rules, along with some practical advice on such topics as the attorney-client privilege, will be given.

Because we are constrained to report an overview of the law without application to specific facts, and because the law in each country continues to evolve, this compendium is not intended to provide legal advice. We offer this compendium as a service, without intending to create any client relationship, any representation of accuracy of the information, or any obligation to provide updated information in the future. We encourage you to consult the authors of the chapters or your normal contacts in our offices as you confront particular factual circumstances or legal issues. For that purpose, we have provided a list of authors and office contacts at the end of this compendium. We also welcome your feedback and comments.

THE EUROPEAN UNION'S PRODUCT LIABILITY AND SAFETY LEGISLATION

Two directives of the European Parliament¹ govern the field of product liability and product safety:

- (i) Council Directive 85/374/EEC of July 25, 1985, on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products² (the “PLD”); and
- (ii) Directive 2001/95/EC of the European Parliament and of the Council of December 3, 2001, on general product safety³ (the “GPSD”).

In European Community law, a directive is a legislative instrument that is binding on the Member States as to the result to be attained but leaves them free to determine the form and methods. EU directives must be transposed by each Member State, meaning that they must be implemented by national laws. Consequently, injured persons or other right holders under the PLD and GPSD will derive their rights from national laws, although these national laws should provide a similar degree of protection across the EU.

This chapter will present an overview of the rules set forth by the PLD and GPSD, which provide the common ground for the existing laws in the various Member States. Later chapters will discuss the national laws of certain EU Member States.

PRODUCT LIABILITY DIRECTIVE

HARMONIZATION OF NATIONAL LAWS

Before 1985, all EU Member States had their own national laws regarding liability for defective products. These national laws were generally grounded on fault-based contractual or tort liability principles. However, the Council of the European Union was concerned that divergences among different nations' laws might distort competition, affect the movement of goods within the common market, and afford varying degrees of consumer protection against defective products.

Consequently, on July 25, 1985, the Council enacted the PLD in order to introduce a common scheme of strict liability. Pursuant to the European legislature, holding

producers to a no-fault liability standard was “the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production.”

All EU Member States have implemented the PLD through national legislation, though the national legislatures were left with limited leeway. In a judgment of April 25, 2002, the European Court of Justice (the “ECJ”) ruled that the PLD mandates full harmonization in that “the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure.” The PLD “provides no possibility for the Member States to maintain or establish provisions departing from Community harmonising measures.”⁴

1 Comprising Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

2 O.J. August 7, 1985, L 210, pp. 29–33, as amended by Directive 1999/34/EC of the European Parliament and of the Council of May 10, 1999, O.J. June 4, 1999, L 141, pp. 20–21.

3 O.J. January 15, 2002, L 11, pp. 4–17, repealing as from January 15, 2004, Council Directive 92/59/EEC of June 29, 1992, on general product safety (O.J. August 11, 1992, L 228, p. 24), and as amended by EC Regulation 765/2008 of July 9, 2008 (O.J. August 13, 2008, L 218, p. 30), and EC Regulation 596/2009 of June 18, 2009 (O.J. July 18, 2009, L 188, p. 14).

4 ECJ April 25, 2002, case C-154/00, ECR 2002, p. I-03879, recitals 10 and 12.

Article 13 PLD allows Member States to maintain existing schemes of contractual or noncontractual liability or specific liability systems. However, the ECJ emphasized that “Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive,” but rather “as referring to a specific scheme limited to a given sector of production.”⁵ In other words, the PLD’s provisions on strict product liability do not preclude the application of other systems of contractual or noncontractual liability based on other grounds, such as fault or warranties in respect of latent defects.

The PLD does not provide any common procedural framework. All European product liability claims are governed by the national procedural and evidentiary rules of the fora in which they are brought.

CHOICE OF LAW

Pursuant to the Rome II Regulation,⁶ the law applicable to a noncontractual obligation arising out of damage caused by a product shall be the law of the country:

- Where both the person claimed to be liable and the person sustaining damage have their habitual residence at the time when the damage occurs; or
- In which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or failing that
- In which the product was acquired, if the product was marketed in that country; or failing that
- In which the damage occurred, if the product was marketed in that country.

However, if the manufacturer or supplier claimed to be liable could not reasonably foresee the marketing of the product, or a product of the same type, in the country determined pursuant to one of the last three points, the law of the country in which that entity has its habitual residence shall apply. Nevertheless, the law of yet another country may apply if it is established—taking all circumstances of the case into account (e.g., a preexisting relationship between the parties, such as a contract)—that the case is manifestly connected more closely with another country.

SCOPE OF APPLICATION

Ratione Personae

Pursuant to Article 1 PLD, the producer shall be liable for damage caused by a defect in its product. A “producer” is defined rather broadly in Article 3 PLD as:

- The manufacturer of a finished product or of a component part;
- The producer of any raw material;
- Any person who, by putting his name, trademark, or other distinguishing feature on a product, presents himself as its producer;
- Any person importing a product into the Community for sale, hire, leasing, or any form of distribution in the course of his business;
- Each supplier of a product if the producer cannot be identified, unless the supplier informs the injured person, within a reasonable time, of the identity of the producer or the particular supplier of the product that injured him or her; and
- Each supplier of an imported product, if the product does not indicate the identity of the importer, even if the name of the producer is indicated.

Ratione Materiae

The scope of the PLD extends to “all movables even if incorporated into another movable or into an immovable” and electricity.⁷

Initially, primary agricultural products—defined as “products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing”—and game were not automatically included in the PLD. The inclusion was left to the Member States’ discretion. However, in the aftermath of the bovine spongiform encephalopathy (“mad cow disease”) crisis, Directive 1999/34/EC, as of December 4, 2000, incorporated primary agricultural products *de officio* into the field of application of the PLD in order to “restore consumer confidence in the safety of agricultural products.”⁸

To trigger the PLD’s strict liability mechanism, the injured person must demonstrate that the harmful product was defective.⁹ A product is defective when it does not provide the safety that a person is entitled to expect, taking all circumstances into account, including:

5 ECJ April 25, 2002, case C-154/00, *ECR* 2002, p. I-03879, recitals 17–19. See also ECJ April 25, 2002, case C-183/00, *ECR* 2002, p. I-03901.

6 Cf. Articles 4.2 and 5 of Regulation 864/2007 of the European Parliament and of the Council of July 11, 2007, on the law applicable to noncontractual obligations (Rome II), *O.J.* July 31, 2007, L 199, pp. 40–49.

7 Cf. Article 2 PLD.

8 Directive 1999/34/EC of the European Parliament and of the Council of May 10, 1999, *O.J.* June 4, 1999, L 141, pp. 20–21, recital 5.

9 Cf. Article 6 PLD.

- The presentation of the product;
- Its reasonably expected use; and
- The time when the product was put into circulation.

A product is not defective for the sole reason that a safer product is subsequently designed and sold.

Finally, the PLD does not apply to injury or damage that arose from nuclear accidents or is covered by international conventions ratified by the Member States.¹⁰

Ratione Temporis

The PLD applies to products distributed after July 30, 1988.¹¹ As for primary agricultural products and game, the PLD entered into force on December 4, 2000.¹²

STRICT AND JOINT LIABILITY

The PLD established the principle of strict (“no-fault”) liability on producers for damage caused by a defective product. The injured person need not demonstrate any fault or negligence by the producer. However, the injured person still bears the burden of proving:¹³

- The damage;
- The defect in the product; and
- The causal relationship between the defect and the damage.

Whenever two or more persons are found liable for the same damage pursuant to the PLD, each person has joint and several liability.¹⁴ The applicable national law will govern any possible rights of contribution or recourse between the jointly and severally liable parties.

RECOVERABLE DAMAGES

Damages covered by the PLD are limited to:¹⁵

- Damage caused by death or by personal injuries; and

- Damage to, or destruction of, any property other than the defective product itself, with a lower threshold of €500,¹⁶ provided that the property:
 - Is ordinarily intended for private use or consumption, and
 - Was used by the injured person mainly for his or her private use or consumption.

The Member States may determine compensation for nonmaterial damage that an injured person may seek.

The Member States may decide, at their discretion, to cap a producer’s total liability for damage resulting from deaths or personal injuries caused by identical products with the same defect. However, the cap may not be below €70 million.¹⁷ Most Member States have limited liability through their national legislation.

The PLD forbids a producer from limiting the producer’s liability to an injured person by contract.¹⁸

DEFENSES

Grounds of Exoneration of Liability

The producer shall be exempted from all liability pursuant to the PLD if it establishes that:¹⁹

- The producer did not put the product into circulation;²⁰
- The defect that caused the damage did not exist when the producer put the product into circulation;
- The product was neither manufactured by the producer for sale or any form of distribution for economic purpose, nor manufactured or distributed by the producer in the course of its business;²¹
- The defect is due to compliance of the product with mandatory regulations issued by the public authorities;
- The state of scientific and technical knowledge when the producer put the product into circulation did not enable the producer to discover the defect; or

10 Cf. Article 14 PLD.

11 Cf. Articles 17 and 19 PLD.

12 Cf. Article 2 of Directive 1999/34/EC of May 10, 1999, O.J. June 4, 1999, L 141, p. 21.

13 Cf. Article 4 PLD.

14 Cf. Article 5 PLD.

15 Cf. Article 9 PLD.

16 Given the full harmonization imposed by the PLD, Member States cannot decide against (fully) implementing the minimum threshold of €500 (cf. ECJ April 25, 2002, case C-52/00, ECR 2002, p. I-03827, and ECJ April 25, 2002, case C-154/00, ECR 2002, p. I-03879). However, to date, this threshold remains subject to different interpretations. In most Member States, the €500 threshold is treated as a “deductible,” in that the amount of damages (for property damage) awarded to a successful plaintiff is reduced by this amount. In other Member States, the threshold is treated as a minimum amount below which no damages can be recovered, but once it is in fact exceeded, full compensation for all damage (without any deduction) can be obtained. Still other Member States completely reject the minimum threshold.

17 Cf. Article 16.1 PLD.

18 Cf. Article 12 PLD.

19 Cf. Article 7 PLD. Pursuant to ECJ case law, those grounds of exoneration are subject to strict scrutiny (see, e.g., ECJ May 10, 2001, case C-203/99, ECR 2001, p. I-03569, consideration 15).

20 In the absence of a definition in the PLD of when a product is put into circulation, the ECJ has provided some guidance in the judgment of May 29, 1997 (case C-300/95, ECR 1997, p. I-02649). In its judgment of February 9, 2006 (case C-127/04, ECR 2006, p. I-01313), the court ruled that “a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed.”

21 As further clarified by the ECJ in its judgment of May 29, 1997 (case C-300/95, ECR 1997, p. I-02649, notably consideration 21).

- In the case of a manufacturer of a component, the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the final product manufacturer.

Member States can decide at their discretion whether to implement the fifth ground of exoneration, also called the “development risk defense,”²² in their national legislation.²³ Most Member States have adopted this defense.

Potentially Exonerated: The Injured Person’s Own Fault

The producer’s liability may be reduced or excluded when, in consideration of all circumstances, the damage is caused both by a product defect and by the fault of the injured person or any person for whom the injured person is responsible.²⁴

Not Exonerated: The Contribution of a Third Party

The producer’s liability shall not be foreclosed or reduced when the damage is caused both by a defective product and by an act or omission of a third party.²⁵ If two or more persons are liable for causing the same damage under the PLD, they shall be jointly and severally liable, notwithstanding their role in causing the damage.²⁶ However, the producer may have rights of recourse or contribution under applicable national law against other persons whose fault caused the damage.

Not Exonerated: Contractual Exoneration or Limitation of Liability

Under the PLD, a producer may not limit or exclude by contract its liability to the injured person.²⁷

DUAL STATUTE OF LIMITATIONS

The PLD has a three-year statute of limitations. The limitation period begins to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect, and the identity of the producer.²⁸

In addition, the injured person’s right to sue a producer for liability under the PLD is extinguished 10 years from the date on which the producer put into circulation the

actual product that caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.²⁹

Any reasons for suspension or interruption of the limitation periods remain subject to applicable national law.³⁰

CONCLUSION ON THE PLD

The PLD aims to implement a common minimum level of consumer protection while safeguarding fair competition and promoting the free movement of goods within the common market by harmonizing previously divergent national laws. While the PLD has succeeded in providing a common level of consumer protection and a common basis for producer liability, the PLD appears to have fallen short of achieving fully harmonized product liability laws throughout the EU.

Notably, national courts have given differing interpretations to specific provisions of the PLD,³¹ and some national legislatures continue to resist the total harmonization sought by the PLD. In practice, product liability claims still appear to be based predominantly on (preexisting) national liability rules rather than on the strict liability provided by the PLD.

The European Commission identified most of these issues in its reports on the application of the PLD that it must produce every five years.³² In its report of September 14, 2006, the Commission observed that the application of national laws in some circumstances leads to different outcomes, but without affecting the functioning of the Internal Market. Consequently, the Commission believed, at that time, that it was not necessary to amend the PLD, since further harmonization could be established through the case law of the ECJ, the oversight power of the Commission, and continuous analysis within working groups.

Since the PLD’s adoption, the ECJ has found that various Member States have failed to align their national legislation with the PLD. It has issued some judgments clarifying specific concepts in the PLD. The ECJ’s judgment of

22 The ECJ has clarified the scope of this defense in its judgments of May 29, 1997 (case C-300/95, *ECR* 1997, p. I-02649, considerations 26–29), and of April 25, 2002 (case C-52/00, *ECR* 2002, p. I-03827).

23 Cf. Article 15.1(b) PLD.

24 Cf. Article 8.2 PLD.

25 Cf. Article 8.1 PLD.

26 Cf. Article 5 PLD.

27 Cf. Article 12 PLD.

28 Cf. Article 10.1 PLD.

29 Cf. Article 11 PLD.

30 Cf. Article 10.2 PLD.

31 See, e.g., the provisions related to the notion of defect of a product, the minimum threshold for recoverable damages, the burden of proof on the injured person, the development risk defense, etc.

32 Cf. Article 21 PLD.

June 4, 2009,³³ might have created an opening towards increased national initiatives in the field of product liability, which in turn could further detract from the degree of harmonization between the national laws of the Member States.

GENERAL PRODUCT SAFETY DIRECTIVE

INTRODUCTION

Although the PLD and GPSD serve the same goals of ensuring a consistently high level of consumer health and safety protection and preserving the unity of the Internal Market, the two directives should not be conflated.

Whereas the PLD has the curative purpose of seeking to remedy injury caused by defective products, the GPSD has the preventive goal of seeking to avoid or mitigate harm from defective products. The GPSD does not affect an injured person's rights pursuant to the PLD.³⁴ The GPSD provides for a set of legal obligations with which producers and distributors must comply.

Like the PLD, the GPSD is a directive that requires implementation in the national laws of the Member States. This chapter will discuss the GPSD's general obligations that Member States must impose on producers and distributors.

SCOPE OF APPLICATION

Ratione Materiae

The GPSD aims to ensure that all products placed on the market are safe.³⁵ "Products" are defined as any new, used, or reconditioned products (including those used for providing a service) that are:

- Supplied or made available in the course of a commercial activity, whether or not for consideration; and

- Intended for consumers or, even if not intended for them, under reasonably foreseeable conditions likely to be used by them.³⁶

Second-hand products supplied as antiques or as products to be repaired or reconditioned prior to use do not fall within the GPSD's field of application, provided that the supplier provides clear information in that respect.

A product is considered safe under the GPSD when it does not present any risk, or only a minimal risk that is compatible with the nature of its use and that is acceptable and consistent in view of maintaining a high level of protection for the safety and health of persons.³⁷ When assessing the safety of a product, the producer or distributor should consider several points:

- The product's characteristics, including its composition, packaging, instructions for assembly and, where applicable, instructions for installation and maintenance;
- The effect on other products, where it is reasonably foreseeable that it will be used with other products;
- The presentation of the product, the labeling, any warnings and instructions for its use and disposal, and any other information regarding the product; and
- The categories of consumers at risk when using the product, particularly children and the elderly.

The feasibility of obtaining higher levels of safety or the availability of other products presenting less risk shall not constitute grounds for considering a product to be "dangerous."³⁸

The GPSD further sets forth the provisions or standards with which products should comply in order to be deemed safe.³⁹ A product is deemed safe if it complies with specific Community provisions governing its safety. In the absence of such provisions, the product must comply with the specific national provisions of the Member State in which the product is marketed or with the voluntary national standards transposing the European standards.⁴⁰

33 The ECJ ruled that "Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products must be interpreted to mean that it does not preclude the interpretation of domestic law or the application of settled domestic case-law according to which an injured person can seek compensation for damage to an item of property intended for professional use and employed for that purpose, where the injured person simply proves the damage, the defect in the product and the causal link between that defect and the damage. Compensation for damage to an item of property intended for professional use and employed for that use is not covered by the scope of application of Directive 85/374. As the harmonisation brought about by that directive does not cover compensation for damage to an item of property intended for professional use and employed for that purpose, that directive does not prevent a Member State from providing in that respect for a system of liability corresponding to that established by that directive." See ECJ June 4, 2009, case C-285/08, O.J. August 1, 2009, C 180, p. 20.

34 Cf. Article 17 GPSD.

35 Cf. Article 1.1 GPSD.

36 Cf. Article 2(a) GPSD.

37 Cf. Article 2(b) GPSD.

38 A "dangerous product" is defined *a contrario* as "any product which does not meet the definition of safe product" (cf. Article 2(c) GPSD).

39 Cf. Articles 3.2 and 3.3 GPSD.

40 The procedure pursuant to which such European standards should be formulated has been determined in Article 4 GPSD.

In the absence of any EC or national laws, a producer should assess a product's conformity to the general safety requirement by taking into account several factors, where relevant:

- Voluntary national standards transposing other relevant European standards or the standards of the Member State in which the product is marketed;
- Commission recommendations setting guidelines on product safety assessment;
- Codes of good practice for product safety in force in the sector concerned;
- The state of the art and technology; and
- Reasonable consumer safety expectations.

However, even if a product conforms with any of these provisions or standards, the competent national authorities may take any appropriate measures whenever there is evidence that, despite such conformity, the product is dangerous.⁴¹

Ratione Personae

The GPSD distinguishes between, and to a certain extent imposes differing obligations upon, producers and distributors.

Pursuant to Article 2(e), producers subject to the GPSD encompass:

- The product manufacturer, when established in the EU, and any other person presenting itself as the manufacturer by affixing its name, trademark, or other distinctive mark to the product, or the person who reconditions the product;
- The manufacturer's representative when the manufacturer is not established in the EU or, if no representative is established in the EU, the importer of the product; and
- Other professionals in the supply chain, insofar as their activities may affect a product's safety.

A "distributor" is defined in Article 2(f) GPSD as "any professional in the supply chain whose activity does not affect the safety properties of a product."

Ratione Temporis

The GPSD entered into force on January 15, 2002, but Member States were required to bring into force the necessary implementing laws, regulations, and administrative provisions only as of January 15, 2004.⁴²

Relationship Between the GPSD and Sector-Specific Safety Requirements Imposed by Community Legislation

The Directive's general safety obligation shall apply to all products unless there is sector-specific Community legislation governing the safety of the products at stake.⁴³

An overview of the sector-specific Community legislation is available on the web site of the Directorate-General for Enterprise and Industry. For instance, in specific areas of risk regulation and management, there have been Directive 88/378/EEC (toys);⁴⁴ Directive 91/368/EEC (machinery safety);⁴⁵ Directive 2001/37/EC (sale and presentation of tobacco products);⁴⁶ Directive 2002/34/EC (cosmetics);⁴⁷ and Directive 2002/8/EC (cross-border funding of legal aid for dispute resolution and requiring Member States to provide effective legal access to consumers, whether by funding lawyers or by facilitating some form of contingency fee mechanism).⁴⁸ Such legislation, for example, pertains to pharmaceuticals, machinery, motor vehicles, toys, and chemicals. The European Commission has drafted a guide to the practical application of the GPSD to various areas where sector-specific legislation exists.⁴⁹

PRODUCER OR DISTRIBUTOR OBLIGATIONS

General Safety and Warning Obligations

Producers, first of all, are required to put only safe products on the market.⁵⁰ Producers should provide consumers with all relevant information necessary for them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use if those risks are not immediately obvious.⁵¹ Producers should also take all measures needed to inform themselves of risks that their products present.

41 Cf. Article 3.4 GPSD.

42 Cf. Articles 21 and 23 GPSD.

43 Cf. Article 1.2 and recitals 12–13 of the GPSD.

44 Implemented in Italy by Legislative Decree No. 313/1991.

45 Implemented in Italy by Legislative Decree No. 494/1996.

46 Implemented in Italy by Legislative Decree No. 241/2000.

47 Implemented in Italy by Legislative Decree No. 10/2002.

48 Implemented in Italy by Ministerial Decree of October 11, 2002.

49 See http://ec.europa.eu/consumers/safety/prod_legis/index_en.htm (all web sites herein last visited August 8, 2012).

50 Cf. Article 3.1 GPSD.

51 Cf. Article 5.1 GPSD. However, the presence of warnings does not exempt any person from compliance with the other requirements laid down in the GPSD.

Obligation to Take All Necessary Precautions

At the initiative of the producer or distributor.⁵² Producers should take all necessary precautions to warn about the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, if those risks are not immediately obvious.⁵³

Examples of those precautionary measures, commensurate with the characteristics of the supplied products, include:

- An indication on the product or its packaging of the identity and details of the producer and the product reference or, where applicable, the batch of products to which it belongs, unless it would be justified not to give such an indication;
- In all appropriate cases, carrying out sample testing of marketed products; investigating and, if necessary, keeping a register of complaints; and keeping distributors informed of product monitoring;
- Adequately and effectively warning consumers;
- Withdrawal from the market; or
- Recall from consumers.

In any event, a recall should be a measure of last resort where other measures would not suffice to prevent the risks involved, in instances where the producers consider it necessary, or where the competent government authority requires them to conduct a recall.⁵⁴

Distributors are required to act with due care to ensure compliance with applicable safety requirements, in particular by:⁵⁵

- Not supplying products that they know or should have presumed, on the basis of the information in their possession and as professionals, do not comply with those requirements;
- Within the limits of their activities, participating in monitoring the safety of products placed on the market, especially by passing on information on product risks, keeping and providing the documentation necessary for tracing the origin of products, and cooperating in action

taken by producers and competent authorities to avoid the risk; and

- Taking measures enabling them to cooperate efficiently with the producers and competent authorities.

Finally, both producers and distributors must cooperate—within the limits of their respective activities—with the competent authorities when they act to avoid product risks.⁵⁶ Competent authorities shall establish procedures for such cooperation, including procedures for dialogue with the producers and distributors involved.

Imposed by the national authorities. Where necessary, the competent authorities of the Member States may impose measures to ensure that producers and distributors comply with their obligations under the GPSD to place only safe products on the market.⁵⁷

Article 8 GPSD provides a nonexhaustive list of the measures that national authorities are entitled to take. Those measures depend on the product's risk. Possible measures might range, for example, from sample taking and the publication of special warnings to a product recall. In any event, while taking those actions, the national authorities should act in a manner proportionate to the seriousness of the risk, taking due account of the precautionary principle.⁵⁸

The measures taken by the national authorities can be addressed, as appropriate, to:⁵⁹

- The producer;
- Within the limits of their respective activities, distributors and, in particular, the party responsible for the first stage of distribution on the national market; or
- Any other person, where necessary, with a view to cooperation in actions taken to avoid risks arising from a product.

Finally, Member States are also empowered to establish:

- A system of effective market surveillance;⁶⁰ and
- A complaint procedure for consumers and other interested parties.⁶¹

52 A practical comprehensive guide provides producers and distributors some guidance on preventing and correcting safety risks posed by their products. See *Product Safety in Europe—Guide to corrective action, including recalls, helping businesses to protect consumers from unsafe products*, available at http://ec.europa.eu/consumers/cons_safe/action_guide_en.pdf.

53 Cf. Article 5.1 GPSD.

54 The Member States could establish codes of good practice to assist producers or the authorities in assessing whether to resort to a product recall.

55 Cf. Article 5.2 GPSD.

56 Cf. Article 5.4 GPSD.

57 Cf. Article 6.1 GPSD.

58 Cf. Article 8.2 GPSD. However, in the presence of products posing a serious risk, the competent authorities should take the appropriate measures with due dispatch (cf. Article 8.3 GPSD, as amended by EC Regulation 765/2008 of July 9, 2008, O.J. August 13, 2008, L 218, p. 30).

59 Cf. Article 8.4 GPSD.

60 Cf. Article 9.1 GPSD.

61 Cf. Article 9.2 GPSD.

Imposed by the European Commission. The European Commission may adopt “emergency measures” in cooperation with the Member States if it becomes aware of a serious risk⁶² from certain products to the health and safety of consumers in various Member States and if other conditions are met:⁶³

- The Member States have significantly differing approaches for dealing with the risk at stake;
- Other procedures set by Community legislation applicable to the products at stake do not allow it to address the risk with the urgency required in view of the safety issue posed by the product; and
- The risk can be effectively eliminated only by adopting appropriate measures applicable at the Community level, in order to ensure a consistent and high level of protection of the health and safety of consumers and the proper functioning of the Internal Market.

The Commission must comply with the procedure set forth in Article 13 GPSD in order to impose emergency measures. Furthermore, those measures are valid only for a maximum of one year but may be extended for additional one-year periods, provided that the same procedure is satisfied again. However, decisions concerning specific, individually identified products or batches of products shall be valid without a time limit.⁶⁴

In any event, emergency measures remain exceptional. Until now, the Commission has imposed only four such decisions.⁶⁵

Notification Obligation

Notification by the producers and distributors. Where producers and distributors know or should know, on the basis of the information in their possession and as professionals, that their product poses risks to the consumer that are incompatible with the general safety requirement, they shall immediately inform the competent national authorities.⁶⁶ The European Commission has established practical guidelines as well as a standard notification form.⁶⁷

Each notification should contain details on:

- The authorities and companies receiving the notification form;
- The producer or distributor making the notification;
- The notified product (brand, model, identification or lot numbers, and the like, accompanied, if possible, by photographs);
- The risks posed by the product;
- Corrective measures that have been taken or are planned to reduce or eliminate the risk to consumers, as well as the company responsible for taking those actions; and
- Companies in the distribution chain in possession of the affected products.

The GPSD requires that the competent authorities be informed without delay, as soon as the relevant information on the dangerous product has become available, and in any event within three days in case of a serious risk and within 10 days in all other cases. Producers and distributors cannot delay submitting the notification simply because part of the information on the dangerous product is not yet available.

In principle, the notification must be sent to the national authorities of all Member States where the product in question is or has been marketed or supplied to consumers.⁶⁸ However, a single notification is permitted to the national authorities of the Member State in which the notifying producer or distributor is established:

- In case of a serious risk where the notification will occur through the Community Rapid Information System for Dangerous Products; or
- In case of a nonserious risk where the national authorities have committed to passing on the notification to the Commission and subsequently to any other relevant national authorities.

Finally, in May 2009 the European Commission established a new online application to further facilitate businesses’

62 Article 2(d) GPSD defines a “serious risk” as “any serious risk, including those of which the effects are not immediate, requiring rapid intervention by the public authorities.”

63 Cf. Article 13.1 GPSD.

64 Cf. Article 13.2 GPSD.

65 The decisions are available at http://ec.europa.eu/consumers/safety/prod_legis/index_en.htm.

66 Cf. Article 5.3 GPSD, as amended by EC Regulation 596/2009 of June 18, 2009, O.J. July 18, 2009, L 188, p. 14. The Directorate-General for Health and Consumer Protection has summarized the different aspects of this obligation in a comprehensive leaflet, available at http://ec.europa.eu/consumers/cons_safe/prod_safe/gpsd/danger_def_en.pdf.

67 See Commission Decision 2004/905/EC of the European Parliament and the Council of December 14, 2004, laying down guidelines for the notification of dangerous consumer products to the competent authorities of the Member States by producers and distributors, in accordance with Article 5(3) of Directive 2001/95/EC, O.J. December 28, 2004, L 381, pp. 63–77, with the standard notification form attached as Annex 1.

68 Cf. Article 1 of Annex I to the GPSD. A list of all national authorities is available at http://ec.europa.eu/consumers/safety/rapex/contact_points.pdf.

notification obligation. The “GPSD Business Application” allows producers and distributors to use this application (instead of traditional methods, such as email or fax) to notify simultaneously the national authorities of all Member States indicated in the notification.⁶⁹

Notification through RAPEX. The Community Rapid Information System for Dangerous Products (“RAPEX”) is aimed at the prompt exchange of information among Member States in the event of a serious product safety risk.

Member States receiving information on a product that (i) presents a serious risk and (ii) is available in more than one Member State must immediately notify the European Commission through RAPEX. Once the Commission verifies that the notification complies with Article 12 GPSD and with the requirements applicable to the functioning of RAPEX, the Commission will forward the notification to the other Member States, which in turn shall immediately inform the Commission of any measures adopted.⁷⁰

The European Commission has provided detailed procedures for RAPEX, as well as a special standard notification form.⁷¹

Transparency and professional secrecy. Information available to the national authorities or the Commission relating to risks to consumer health and safety posed by products, in principle, must be made available to the public. The public should have access to information on product identification, the nature of the risk, and the measures taken.⁷²

This transparency requirement inevitably raises concerns of professional secrecy (trade secrets and commercially confidential information). The GPSD has addressed this issue:⁷³

- Information obtained by Member States and the Commission for the purposes of the GPSD is considered to be covered, by its nature, by professional secrecy in duly justified cases. However, this does not apply to information relating to product safety that must be made public in order to protect the health and safety of consumers.

- The Member States and the Commission must take all necessary steps to ensure that their officials and agents are prohibited from disclosing information covered by professional secrecy.
- The protection of professional secrecy may not prevent dissemination to the competent authorities of information relevant for ensuring the effectiveness of market monitoring and surveillance activities. However, the authorities receiving information covered by professional secrecy must ensure its protection.

Sanctions and Redress

In order to ensure the effective enforcement of the obligations incumbent on producers and distributors, the GPSD requires the Member States to adopt rules for penalties applicable to infringements of the national provisions implementing the GPSD and to take all measures necessary to ensure that they are implemented. Those penalties should be effective, proportionate, and dissuasive, and they must receive Commission approval.⁷⁴

Nevertheless, the GPSD has specific built-in procedural and substantive rights to protect producers and distributors when the national authorities decide to impose corrective measures.⁷⁵

- **Motivation requirement:** Any measure that restricts the placing of a product on the market or requires its withdrawal or recall must: (i) state the appropriate reasons on which it is based; (ii) give notice as soon as possible to the party concerned; and (iii) indicate the remedies available under the relevant national law and the time limits for applying for those remedies.
- **Rights of defense:** The parties concerned, whenever feasible, shall be given an opportunity to submit their views before the adoption of the measure or, if not feasible in view of the urgency of the measure to be taken, in due course after the measure has been implemented. Measures requiring the withdrawal of a product or its recall shall take into consideration the need to encourage distributors, users, and consumers to contribute to the implementation of those measures.
- **Remedies:** Member States must ensure that the concerned party may challenge in court any measure taken by the competent authorities to restrict the placing of a product on the market or to require its withdrawal or recall.

69 The application is accessible at <https://webgate.ec.europa.eu/gpsd-ba/>, where the manual *How to prepare and submit a notification form* is available as well.

70 Cf. Article 12 GPSD and Annex II to the GPSD.

71 See Commission Decision 2010/15/EU of December 16, 2009, laying down guidelines for the management of RAPEX, established under Article 12, and of the notification procedure established under Article 11 of the GPSD, O.J. January 26, 2010, L 22, pp. 1–64.

72 Cf. Article 16.1, paragraph 1, GPSD.

73 Cf. Article 16.1, paragraph 2, and Article 16.2 GPSD.

74 Cf. Article 7 GPSD.

75 Cf. Articles 18.1, 18.2, 18.3, and 11–13 GPSD.

- **No predetermination of (criminal) liability:** Any decision taken pursuant to the GPSD to restrict the placing of a product on the market or to require its withdrawal or its recall must be without prejudice to the assessment of the liability of the party concerned, in light of the applicable national criminal law.
- **Information to the European Commission:** If measures are ordered restricting the placing on the market of products or requiring their withdrawal or recall, the Member State must inform the European Commission of those measures, specifying its reasons for adopting them, as well as any modification or lifting of those measures, and any relevant information. The Commission shall proceed with an examination of the notified measure on the basis of the information contained in the notification. It shall then either forward the notification to the other Member States or conclude that the measure does not comply with Community law, in which case it shall immediately inform the notifying Member State.⁷⁶

⁷⁶ Articles 12 and 13 GPSD provide for specific procedures in view of products posing a "serious risk."

PRODUCT LIABILITY LAW IN FRANCE

France has implemented both Council Directive 85/374/EEC of July 25, 1985, on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (the “PLD”) and Directive 2001/95/EC of December 3, 2001, on general product safety (the “GPSD”).

French product liability law is profoundly inspired by these European provisions, although French law continues to include several other provisions governing liability for defective products that remain applicable in addition to the PLD and GPSD principles. This chapter will briefly highlight the principal rules specific to French law.

LIABILITY FOR DEFECTIVE PRODUCTS

Product liability principles exist under both civil and criminal law.

CIVIL LIABILITY

Causes of Action

The user of defective goods has several causes of action against the vendor or manufacturer. The user may assert all available causes of action should their conditions be fulfilled.¹

Several legal actions may enable the buyer of defective products to obtain the rescission of the sale, a reduction of the sale price, or damages based upon:

- (a) Latent defects (*vices cachés*), Article 1641 *et seq.* of the French Civil Code;²
- (b) Nonconformity defects (*défait de conformité*), Articles 1603 and 1604 of the French Civil Code and Article L. 211-4 of the French Consumer Code;³

- (c) General civil liability, whether tortious, Article 1382 *et seq.*⁴ of the French Civil Code, or contractual, Article 1147 *et seq.*⁵ of the French Civil Code; or
- (d) Strict liability of the manufacturer of a defective product, Article 1386-1 *et seq.* of the French Civil Code.

Legal actions based on latent defects and compliance defects apply only in the case of a sales agreement, and there need not be a safety issue. In contrast, the strict liability rules aim to protect persons from a product’s lack of safety even in the absence of a contract.

Principles Derived From the PLD

Since May 1998,⁶ the French Civil Code has included an exhaustive set of regulations that apply when a defective product⁷ harms an individual.⁸ Treating them as important general principles, the French legislature inserted this set of rules into the French Civil Code (Title IV *bis*: Liability for defective products), just after the chapter relating to general civil liability rules (Title IV: Undertakings formed without an agreement).

1 For instance, an action can be based on both latent defects and defective product liability as stipulated under Article 1386-18 of the French Civil Code.

2 “A seller is bound to a warranty on account of the latent defects of the thing sold which render it unfit for the use for which it was intended, or which so impair that use that the buyer would not have acquired it, or would only have given a lesser price for it, had he known of them.”

3 “[The seller] has two main obligations, that to deliver and that to warrant the thing which he sells. . . . Delivery is the transfer of the thing sold into the power and possession of the buyer.”

4 “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.”

5 “A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part.”

6 Law No. 98-389 of May 19, 1998, on liability relating to defective products.

7 A “product” is defined under Article 1386-3 of the French Civil Code as “any movable, even though incorporated into an immovable, including the products of the soil, of stock-farming, of hunting and fishing.” The same article provides that electricity shall be deemed a product.

8 They apply also to compensation in excess of an amount fixed by decree (currently €500) for damage to property other than the defective product itself.

Pursuant to Article 1386-1 *et seq.*, the producer is liable for any loss or damage caused by a defect in goods put into circulation after May 21, 1998,⁹ whether or not the producer has a contract with the injured person.

A “producer” is defined under Article 1386-6 as “the manufacturer of a finished product, the producer of a raw material, the manufacturer of a component part, where he acts as a professional.” The same article considers a “producer” to be any person acting in a professional context (as opposed to acting for its private use and benefit) “who presents himself as the producer by putting his name, trade mark or other distinguishing feature on the product” or “who imports a product into the European Community for sale, hire, with or without a promise of sale, or any other form of distribution.”

In sum, the injured consumer may start a legal action against:

- (a) Manufacturers (of finished products or of component parts) and producers of raw materials;
- (b) Own-branders – Suppliers who put their names on the products and give the impression that they are the producers;
- (c) Importers – Meaning importers into the European Union, not just into the French market.

Pursuant to Article 1386-4 of the French Civil Code and in accordance with the PLD, a product is defective “when it does not provide all the safety that can be legitimately expected from it.”¹⁰

As required by general French civil liability rules, the injured person must prove actual damage, a defect in the product, and a causal relationship between the defect and the damage.¹¹ Once these elements are proven, the producer shall be held strictly liable for all damage to the injured person, despite the producer’s absence of fault or negligence.

The producer can avoid or limit liability if it can prove any of the seven defenses listed under Article 7 of the PLD (transposed in Article 1386-11) or if it can prove the claimant’s negligence (Article 1386-13 of the French Civil Code):

- (a) The producer did not supply the product;
- (b) The state of scientific and technical knowledge at the time it supplied the product did not permit the discovery of the defect;¹²
- (c) The defect was the inevitable consequence of complying with mandatory laws or regulations;
- (d) The defect was not in the product at the time it was supplied;
- (e) The product was not intended to be sold or distributed in any manner;
- (f) In the case of a producer of a component used in another product, the defect was due either to the design of the finished product or to defective specifications given to the component manufacturer by the producer of the finished product; or
- (g) The damage was jointly caused by a defect and by the injured person’s negligence (or by the negligence of someone under the injured person’s control).

Moreover, Article 1386-10 of the Civil Code provides that “the producer may be responsible for the defect even when the product was manufactured in accordance with good engineering practices or existing standards or when the distribution of the product was subject to and obtained an administrative authorization.” Recent cases have held that insufficient information regarding the product can make the product defective.

Finally, a strict liability civil action is subject to two statutes of limitation as the PLD provides:

- (a) First, the injured person must begin his or her court action within three years of the date of injury or, if later, the date when he or she knew or should have known of the claim against the defendant (see Article 1386-17 of the French Civil Code).
- (b) However, the producer cannot be sued 10 years after the product was introduced unless a legal action was started during that period (Article 1386-16 of the French Civil Code).

Warranties and Limited Liability Provisions

A buyer may also benefit from contractual warranties. The French Consumer Code provides that the seller may offer a “commercial warranty” to the buyer in addition to other legal warranties (such as latent defects and product

9 Law No. 98-389 of May 19, 1998, on liability relating to defective products implementing the PLD, entered into force on May 21, 1998, and is codified under Article 1386-1 *et seq.* of the French Civil Code; before that date, persons injured by defective products could rely on provisions of the French Civil Code (such as, *inter alia*, Article 1603 *et seq.* on nonconformity defects, Article 1641 on latent defects, or Article 1382 *et seq.* on general civil liability). Since May 21, 1998, persons injured by defective products can seek liability on additional grounds.

10 French courts have held that insufficient information regarding the risks associated with the product or its use on labels and product warnings can constitute evidence of a defective product (French Supreme Court, Nov. 7, 2006, no. 05-11.604; French Supreme Court, Jan. 24, 2006, Bull. civ. 2006, I, no. 35).

11 The injured person does not need to explain the origin or nature of the causal relationship (see, e.g., Toulouse Court of Appeal, May 22, 2007, Jurisdata no. 341395, which held that it was sufficient for the injured person to evidence that her car unexpectedly caught fire during normal use of the vehicle).

12 This exception is interpreted extremely strictly, as the Court of Justice of the European Union has specified that the highest level of scientific knowledge must be taken into account. CJEU, May 27, 1997, Dalloz 1998.488, Penneau.

safety) that remain applicable in any case (Articles L. 211-15 and 211-16 of the French Consumer Code).

While as a general rule the producer cannot limit or exclude its liability to the injured person by contract (Article 1386-15 of the French Civil Code), contractual provisions limiting liability between professionals are valid as long as: (i) they relate to damage caused to property not used by the injured party mainly for its own private use (Article 1386-15, paragraph 2, of the French Civil Code); (ii) the defect does not result from an intentional act (or omission) or from the supplier's gross negligence (which French case law defines as negligence of extreme severity bordering on willful misconduct and denoting the unfitness of the defaulting obligor to fulfill its contractual duty¹³); (iii) the clause limiting liability does not make the core obligations of the defaulting party meaningless—i.e., the maximum amount of the indemnification contractually defined must not be so low that it contradicts the core obligation of the contract;¹⁴ and (iv) the contract containing the clause limiting the warranty against hidden defects is concluded between professionals of the “same specialty” (which is narrowly interpreted by case law) and does not involve a consumer.

Brief Description of Civil Proceedings

Civil proceedings begin with a statement of claim (*assignation*) served on the defendant before French civil courts (*Tribunal d'instance*, *Tribunal de grande instance*, or *Tribunal de commerce*). Proceedings usually last several months. The court may appoint a judicial expert to analyze the product and determine the cause of any defect and injury. In this case, proceedings can then last up to two years.

During civil proceedings, the parties (the plaintiff and the respondent), usually represented by lawyers, exchange various written submissions in which they present their own versions of the events, their legal arguments, and claims. The parties also have to disclose to each other the evidence on which their claims or defenses rely.

In contrast to civil procedure in the U.S., broad pretrial discovery is not available in France. A “fishing expedition” is not permitted, and parties need disclose only the

evidence useful to their claims.¹⁵ Nevertheless, a party which knows that the other party holds some relevant evidence can ask the court to order the other party (or even third parties) to produce it, subject to a fine for noncompliance (Articles 11 and 145 of the French Code of Civil Procedure). There is no provision in French procedure for the deposition of witnesses or interrogatories.

Once the parties have exchanged all of their evidence and arguments and the case is deemed ready for argument, an oral hearing takes place before the court. While the appearance of witnesses in civil and commercial proceedings remains the exception, when witnesses appear during hearings on the merits, the judge conducts their examination. The court will then render its decision within several weeks or months. The parties may appeal the decision within one month of the date of notification (Article 538 of the French Code of Civil Procedure¹⁶). Save when the court has ordered provisional enforcement of the judgment, the appeal is suspensive, and the judgment may not be enforced during the pendency of the appeal.

“Class Actions” Under French Law

Despite the recent debates and bills¹⁷ to implement them, class actions still do not exist in France. However, associations or nonprofit organizations can bring some specific types of judicial collective action: (i) actions taken in a collective interest; and (ii) joint representative actions. These collective actions typically take place where product safety is at stake.

Actions taken in collective interest. Under Article L. 421-1 of the French Consumer Code, when a criminal offense has been committed, authorized consumer organizations (*associations agréées*) may exercise the “rights conferred upon civil parties relating to facts which cause direct or indirect harm to the collective interest of consumers.” Article L. 421-7 of the same code allows authorized associations to “join proceedings in civil actions brought by one or more consumers in order to stop illicit acts or request the cancellation of unfair contract terms.” These organizations may also initiate a civil action in order to nullify an “illegal or abusive clause from any contract or standard contracts offered to or intended for consumers” under Article L. 421-6.

13 A decision of the French Supreme Court (*Cour de cassation, chambre commerciale*) on June 29, 2010, held that “gross negligence cannot be construed from a simple breach of a contractual obligation, even a core one, but should be based on the severity of the defaulting party's behavior.” Decision no. 09-11841.

14 *Id.*

15 Article 9 of the French Code of Civil Procedure states, “Each party must prove, according to the law, the facts necessary for the success of his claim.”

16 Time limits are extended when it comes to foreign defendants. Article 643 of the French Code of Civil Procedure states, “Where the action is brought before a court sitting in the mainland of France, the time-limits for appearances, lodging an appeal, a motion to set aside, a motion for revision and an appeal in cassation will be extended by: 1° One month for persons living in an overseas administrative department or an overseas territory; 2° Two months for persons living in a foreign country.”

17 Legislative bills have been submitted in April 2006, February 2007, March 2007, December 2007, September 2009, and October 2009. An “information report” dated May 26, 2010, has been edited by the Senate, proposing class actions in France. The public debate on implementing class actions in France has been recurrent since the 1980s.

Associations may claim collective damages and initiate proceedings to stop the allegedly illegal behavior. They aim to protect collective interests rather than the individual interests of consumers. They are not considered to be class actions, because individuals will not receive compensation for individual harm.

Joint representative actions. Joint representative actions enable authorized organizations to bring claims to protect their members' individual interests. Article L. 422-1 of the French Consumer Code provides that:

where several consumers, identified as natural persons, have suffered individual damages caused by the same business act and which have a common origin, any approved association . . . may, if it has been duly authorized by at least two of the consumers concerned, institute legal proceedings to obtain reparation before any court on behalf of these consumers.

French law also allows specific associations to represent certain categories of injured persons by bringing representative actions in the fields of the environment,¹⁸ stockholders,¹⁹ and health.²⁰

Because French law strictly regulates representative actions, they are often criticized as not efficient enough to protect consumers' interests. In order to bring a joint representative action, the authorized association must have the written approval of each claimant, and the claimant may revoke the authorization at any time. Moreover, the organization may not advertise or approach individuals personally to obtain their approval. Because of these hurdles, joint representative actions are used very rarely in France.

Punitive Damages

The notion of punitive damages does not exist under French law. The injured person is entitled only to full reparation of any losses.²¹

However, an award of punitive damages under a law that permits such damages is not per se contrary to international public policy, according to a recent decision of the French Supreme Court (*Cour de cassation*). But for such a judgment to be recognized and enforced in France, the punitive damages awarded must be in proportion to the claimant's actual damage.²²

In contrast, French courts recognize and award damages for moral prejudice, pain and suffering, and mental fear associated with a defective product.²³

Lawyers' Fees

Contingent fees are valid as long as they do not constitute the entire amount of the fees²⁴ charged to the client. The lawyer and client can agree to a potential extra payment in addition to the initial retainer. Under French law, lawyers' fees are usually agreed and calculated in two different ways: either billed by the hour or as a lump sum.

The losing party must pay the adverse party's legal costs (*les dépens*, meaning all procedural costs incurred with the proceedings, such as cost of service and experts' fees).²⁵ The court will also normally order the losing party to pay the adverse party's lawyer's fees. However, the court typically fixes the amount, and the granted amount rarely corresponds to the amount claimed and actually spent by the winning party.²⁶

CRIMINAL LIABILITY

Corporate Liability

French criminal liability applies not only to individuals, but also to legal business entities and their representatives.²⁷

18 Article L. 142-3 of the Environment Code.

19 Article L. 452-2 of the Monetary and Financial Code.

20 Article 1114-2 of the French Public Health Code.

21 French case law is constant on this issue: "[T]he reparation of a damage, which must be in full, cannot exceed the amount of the damage." Cass. civ. 1, Nov. 9, 2004, Bull. civ. I, no. 264.

22 Cass. civ. 1, Dec. 1, 2010, Dalloz 2011, no. 6, p. 423.

23 In 10 decisions dated September 12, 2008, the Paris court of appeal held that damages resulting from the fear of having a defective cardiac catheter implanted could be recovered.

24 Article 10 of Law No. 71-1130 of December 31, 1971: Prohibition of "de quota litis" agreements.

25 Article 696 of the French Code of Civil Procedure: "The legal cost will be borne by the losing party, unless the judge, by a reasoned decision, imposes the whole or part of it on another party."

26 Article 700 of the French Code of Civil Procedure: "As provided for under I of Article 75 of the Act n° 91-647 of 10 July 1991, in all proceedings, the judge will order the party obliged to pay for legal costs or, in default, the losing party, to pay to the other party the amount which he will fix on the basis of the sums outlayed [sic] but not included in the legal costs. The judge will take into consideration the rules of equity and the financial condition of the party ordered to pay. He may, even sua sponte, for reasons based on the same considerations, decide that there is no need for such order."

27 In addition, French law provides that persons other than legal representatives of a company may be held criminally liable in the pharmaceutical industry. For instance, Article L. 5124-2 of the French Public Health Code provides that the "responsible pharmacists" are personally responsible for complying with provisions relating to the safety of the medication manufactured and sold by the company.

The criminal liability of legal entities, effective since March 1, 1994, represents one of the principal innovations of French criminal law over the last 20 years.²⁸ Since December 31, 2005,²⁹ all criminal offenses existing under French law can apply to legal entities.³⁰

Criminal liability of individuals is in principle limited to personal liability: "In principle, no criminal proceedings can be initiated, no condemnation to a sentence can be pronounced against a person who has not been the author, or the coauthor or the accomplice of an offense."³¹ This principle has several exceptions, notably with respect to the entrepreneur (*chef d'entreprise*). French courts have held on several occasions, without reference to any specific statute, that an entrepreneur can be held criminally liable for its employees' offenses, whether intentional or not. For example, the entrepreneur's liability was upheld in the case of a sale of forged goods by its subordinates.³² The entrepreneur can avoid criminal liability by demonstrating that it lawfully delegated its power to another person.³³

If a legal entity is found criminally liable, this does not prevent its legal representative from being held liable as well, but it does not necessarily mean that the representative will also be held criminally liable. In other words, criminal liabilities are not cumulative, and the legal entity can be solely found criminally liable.

Prohibited Acts

Several criminal laws apply to hazardous products:³⁴

Deceit (*tromperie* as defined under Article L. 213-1, 3°, of the French Consumer Code³⁵):

This offense is intended to punish safety breaches. Indeed, the Code provides that deceit or an attempt to deceive may occur not only with respect to the nature or kind of a product, but also with respect to "the fitness for use, the risks inherent in use of the product, the checks carried out, the operating procedures or precautions to be taken." For example, it is deceit to sell electrical equipment that does not comply with applicable standards or toys bearing labels that falsely state compliance with the standard safety rules.

Penalties are doubled when the deceit allows the use of goods that are dangerous for human or animal health (Article 213-2 of the French Consumer Code).

Involuntary bodily harm (*atteintes involontaires à l'intégrité de la personne humaine* as defined under Article 222-19 of the French Criminal Code³⁶):

The offense of *involuntary* bodily harm requires proof of three elements: (i) careless acts or omission; (ii) bodily harm; and (iii) a causal link between the fault and the harm. The bodily harm can be physical or mental (it can be a disease), and the injured person must have had a total incapacity to work. No criminal intent is needed for this offense, and it is sufficient to prove awkwardness, lack of prudence, lack of attention, negligence, or violation of a legal obligation of prudence or security or, when it comes to the aggravating factor of immediate exposure to a risk: (i) a specific act of misconduct that exposed another person to a particularly serious risk of which the perpetrator must have been aware; or (ii) a deliberate violation of a legal obligation (statute or regulation) of prudence or security.

28 Article 121-2 of the French Criminal Code provides that "legal entities, with the exclusion of the State, are criminally liable, pursuant to the provisions of Articles 121-4 to 121-7, for offenses committed on their behalf, by their organs or representatives."

29 French Law No. 2004-204 of March 9, 2004 (referred to as "law Perben II").

30 Sanctions are more severe when it comes to legal entities: the fines, in particular, are multiplied by five.

31 *Droit pénal général* - M. Bouloc - *Précis Dalloz* - Paragraphs 345 *et seq.* The French Criminal Code itself confirms such principle in its Article 121-1: "No one is criminally liable except for his own conduct," and the French Supreme Court has repeatedly held that "no one is punishable other than by reason of its/his/her personal acts."

32 *Crim. March 11, 1959* - *Droit pénal général* - M. Bouloc - *Précis Dalloz* - Paragraphs 345 *et seq.*

33 The French Supreme Court accepts in fact that, "except in the case where law provides differently, the entrepreneur who has not personally participated in the offense, may discharge him/herself from his/her criminal liability if he/she provides the proof that he/she has delegated his/her powers to a person with the necessary competency, authority and means." *Crim. March 11, 1993, Bull. crim. no. 112.*

34 French criminal courts have discretionary powers to determine which penalty (imprisonment, fine, or both) shall apply. The judge can determine the amount of a fine up to the maximum amount set in French criminal laws, taking into account all circumstances.

35 "Anyone, whether or not they are party to the contract, who may have deceived or attempted to deceive the contractor, by any procedural means whatsoever, even if this is through the intermediary of a third party, shall be punished by two years imprisonment and a € 37,500 fine: . . . even in respect of . . . the fitness for use, the risks inherent in use of the product, the checks carried out, the operating procedures or precautions to be taken."

36 Article 222-19 of the French Criminal Code: "Causing a total incapacity to work in excess of three months to another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulations, in the circumstances and according to the distinctions laid down by article 121-3, is punished by two years' imprisonment and a fine of €30,000. "In the event of a deliberate violation of an obligation of safety or prudence imposed by statute or regulation, the penalty incurred is increased to three years' imprisonment and to a fine of €45,000."

Endangering the lives of others (*délict de mise en danger de la vie d'autrui*, Article 223-1 of the French Criminal Code³⁷):

This offense requires proof of three elements: (i) a manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation; (ii) an immediate risk of death or injury; and (iii) a causal link between the violation and the risk. The element of “manifestly deliberate violation” requires not the intention to injure somebody, but merely the awareness of violating a specific obligation imposed by a statute or regulation.

Failure to help someone in danger (*non assistance à personne en danger*, Article 223-6, paragraph 2, of the French Criminal Code³⁸):

This offense applies, for instance, in the event that an executive officer or company has not taken all the measures necessary to prevent or stop the expansion of any risk of which the officer or company should have been aware.

Misleading commercial practice (*Pratique commerciale trompeuse*, Article L. 121-1 of the French Consumer Code, which has recently replaced the offense of *publicité trompeuse*, i.e., deceptive advertising):

This offense applies when a professional: (i) creates confusion between its product and another product or service; (ii) misleads the consumer by making a false statement about its product concerning its availability, its main characteristics, its price, its after-sale service, the scope of commitment of the advertiser, the identity and quality of the advertiser, or the handling of consumers' complaints; or (iii) omits to state one of the main characteristics of the product. This offense is punished by two years' imprisonment and a €37,500 fine for individuals and a €187,500 fine for legal entities.

Finally, Articles R. 223-1 *et seq.* of the French Consumer Code punish by fines, the confiscation of the goods, or both, the offense of not complying with a prohibition to sell, suspension of sales, or withdrawal of dangerous products ordered by public authorities.³⁹

Criminal Proceedings

Criminal proceedings involve the commencement of a public action by the government. Such a public action may be commenced either:

- (a) At the initiative of the state itself (the public prosecutor), in which case the victim may decide later to join the criminal proceedings; or
- (b) At the victim's direct initiative, either by summoning the adverse party to appear before the criminal courts (*citation directe*⁴⁰) or by filing a criminal complaint with an application to join in the proceedings (*plainte avec constitution de partie civile*⁴¹).

The public action aims to have the criminal offense publicly determined and punished. Depending upon the nature of the offense, three types of criminal courts have jurisdiction: (a) *Tribunal de police*, for relatively minor offenses (*contraventions*); (b) *Tribunal correctionnel*, for misdemeanors (*délits*); and (c) *Cour d'assises*, for felonies (*crimes*). Criminal courts may order fines, imprisonment, or any other specific sanction as stipulated by the French Criminal Code (*Code pénal*), but they will not *sua sponte* grant damages to the victim of the criminal offense.

A victim who has been “personally” harmed by the criminal offense and who wants compensation may start a civil action (Article 2 of the French Code of Criminal Procedure).⁴² Pursuant to Article 3 of the Code of Criminal Procedure, this civil action may be brought before the same criminal court. The civil action will not necessarily be suspended until the criminal court has ruled on the existence of the criminal offense.

37 “The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year's imprisonment and a fine of €15,000.”

38 “Anyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years' imprisonment and a fine of €75,000. “The same penalties apply to anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations.”

39 Article R. 223-1: “Anyone who, in contravention of the provisions of an order adopted in application of article L. 221-5: Has manufactured, imported, exported, put on the market free of charge or at a fee, a product or a service that is subject to a suspension measure; Has failed to circulate warnings or precautions for use ordered; Has not, in accordance with prescribed conditions of place and time, totally or partially exchanged, modified or reimbursed, the product or service; Has not withdrawn or destroyed the product, will be punished with the fine laid down for petty offences (fifth category). In the event of a repeat offence, the fine laid down for repeat petty offences (fifth category) applies.

“Anyone who, in contravention of the provisions of an order issued by the préfet adopted in application of article L. 221-6, has not respected: Emergency measures prescribed in order to stop the serious or immediate danger presented by the product or service; The detention measure decided upon for products likely to present a serious or immediate danger; Measures to suspend the provision of services; will be punished by the fine laid down for petty offences (fourth category).”

40 Articles 390 *et seq.* of the French Code of Criminal Procedure.

41 Article 85 of the French Code of Criminal Procedure.

42 Article 4 of the French Criminal Code permits the separate civil action for compensation: “The civil action tending to get compensation for the loss suffered in connection with the offense may also be exercised separately from the public prosecution.”

Depending on the case's complexity, a criminal investigation may be conducted under the control of the examining magistrate (*juge d'instruction*). The criminal court, composed of three magistrates, presides over the trial. The examining magistrate, who is in charge only of the investigation, cannot participate in the trial.

The criminal trial is divided into four principal phases:

- (a) Verification of the parties' identity and factual review of the case;
- (b) Motions challenging the legality of the procedure (on grounds such as lack of jurisdiction or nullity of the action);
- (c) Examination of the defendant, witnesses, and experts; and
- (d) Closing arguments for the plaintiff, the prosecution (requesting a specific sentence or, in exceptional circumstances, acquittal) and, finally, the defendant. The defendant or counsel will always speak last, after the public prosecutor.

Save for a few exceptions, criminal hearings are open to the public. The parties are supposed to appear in person at each hearing but may be represented by their lawyers. Should a party not speak French fluently, the court will provide a translator.

After the closing arguments, the criminal court withdraws to deliberate and then renders its decision to convict or acquit the defendant. However, if the case is complicated and requires further deliberation, the criminal court may inform the parties that it will render its decision later.

A party may appeal the decision within 10 days of the rendering of the judgment.⁴³ But for certain exceptions, the appeal is suspensive, meaning that the judgment is not enforced during the appeal.

LEGAL OBLIGATIONS OF PROFESSIONALS THAT MADE OR SOLD DANGEROUS PRODUCTS

The GPSD, transposed under French law, mandates the safety of products. Producers and distributors who "know or ought to know, on the basis of the information in their

possession and as professionals, that a product that they have placed on the market poses risks to the consumer that are incompatible with the general safety requirement are required to inform the competent authorities immediately." (Article 5 (3)).

The general safety requirement is broadly defined: "Products and services must, under normal conditions of use or under other circumstances that may reasonably be foreseen by the professional, offer the safety that can legitimately be expected and must not be a danger to public health." (Article L. 221-1 of the French Consumer Code).

Unlike the PLD, which was codified in the French Civil Code, the GPSD is codified in the French Consumer Code. Prior to defining existing legal obligations (2.2), the GPSD first determines which professionals are to enforce its safety obligation under French law (2.1).

PROFESSIONALS SUBJECT TO THE GENERAL SAFETY OBLIGATION

Both the producer and the distributor of products are subject to the general safety obligation (as defined under Article L. 221-1 of the French Consumer Code) for the products that they introduce into the market. Both the producer and the distributor have a mutual obligation, in particular, to provide public notification of the risk, as well as a duty to cooperate (Article L. 221-1-4 of the French Consumer Code⁴⁴).

SCOPE AND DEFINITION OF THE PRODUCER'S OBLIGATIONS

The "producer's obligations" are essentially obligations to perform (*obligation de faire*). The producer is to take "any useful measures" to contribute to compliance with the safety obligation: those actions must be appropriate measures to prevent and mitigate the risk while remaining proportional to the product's danger (Article L. 221-9 of the French Consumer Code).⁴⁵

43 Article 498 of the French Code of Criminal Procedure.

44 "Distributors participate in the monitoring of the safety of products on the market . . . with their cooperation to the actions undertaken by producers and by administrative authorities to avoid such risks."

45 "The measures decided upon by virtue of articles L. 221-2 to L. 221-8 must be in proportion to the danger presented by the products and services. These may aim to warn of, or put an end to, the danger with a view to thereby guaranteeing the safety that can legitimately be expected in accordance with France's international commitments."

In addition to the *general safety obligation*, Articles L. 221-1-2⁴⁶ and L. 221-1-3⁴⁷ of the French Consumer Code set forth other safety obligations for the producer:

- **Dual obligation to inform:** The producer must inform the consumer of the product's risks and the means to assess and avoid them. The producer must provide the consumer with any "useful information." In addition, the producer is obliged to monitor the safety of its product after sale and, in particular, as set forth in the Code, to "remain informed of risks that the products that it markets may present."
- **Organize the monitoring of the products' safety on the market and traceability:** The product must be easily identifiable and the producer must be easy to contact in the event of a problem.
- **Initiate the necessary actions:** The duty requires withdrawal and recall from the market and the warning of consumers.
- **Notify authorities of the existing risk:** Producers and distributors that have marketed unsafe products must notify the relevant public authority immediately.⁴⁸ Such notification must indicate the measures that have been initiated to prevent the risks.

Until May 1, 2009, notice was to be given to the French competent authority (the *Direction Départementale de la Protection des Populations*).⁴⁹ Since then, with respect to nonfood products, the notice must use the **European IT application called "business application"** created by the European Commission's Directorate-General in charge of consumers. This single form enables simultaneous notification to other national authorities of the Member States in which the product was marketed.⁵⁰

It is therefore unnecessary to simultaneously inform the DDPP, since that body will be de facto informed through the "business application." Nevertheless, a producer or distributor can still report to the DDPP in case it is not possible to use the "business application" process. Once a national authority has been made aware of a product's safety risk, depending on the extent of the risk incurred, the national authority may be compelled to pass the information to the European Commission through the RAPEX system.⁵¹

Despite the duty to notify in the French Consumer Code, French law does not impose any civil or criminal sanctions for failure to do so. Therefore, a producer who marketed or otherwise supplied consumers with a defective or dangerous product in France cannot be liable under civil or criminal laws for failing to notify the competent authorities of an unsafe product. However, the failure to provide notification can be considered an aggravating circumstance in the event that the producer is held liable: for instance, the judge may infer from such breach that the producer was negligent, which may increase its potential liability.

Producers and distributors should act voluntarily to redress the risk of unsafe products on the market. However, should they remain inactive or take insufficient action, the national authorities also may order certain actions:

- Prohibit or restrict the production, sale, and distribution of products (Article L. 221-3, 1°, of the French Consumer Code);
- Order the withdrawal or recall of the product from the market (Article L. 221-3, 3°, of the French Consumer Code); or

46 "I. The producer shall provide the consumer with sufficient information to enable him to evaluate the risks inherent in a product during its normal or reasonably foreseeable useful life and to guard against them, when such risks are not immediately apparent to the consumer without adequate forewarning. . . .

"II. The producer shall adopt measures which, in view of the characteristics of the products he supplies, enable him to: a) Keep abreast of the risks which the products he markets may present; b) Implement the actions necessary to contain those risks, including withdrawal from the market, the issuing of adequate and effective warnings to consumers and recalling products sold from consumers.

"Such measures may consist, inter alia, of sample testing or indication on the product or its packaging of instructions for use, the identity and address of the person responsible for marketing, and the product or batch reference. Such indications may be made compulsory by order of the Minister for Consumer Affairs and the other minister(s) concerned."

47 "When a producer or a distributor knows that products intended for consumers which he has put onto the market do not meet the requirements of Article L. 221-1, he shall immediately inform the relevant administrative authorities thereof and indicate the actions he is implementing to guard against risks to consumers.

"The informational requirements are stipulated by order of the Minister for Consumer Affairs and the other ministers concerned. The producer or the distributor cannot avoid his obligation by pleading ignorance of risks which he could not reasonably be unaware of."

48 In France, the competent authority is the *Direction Départementale de la Protection des Populations*, or the "DDPP" formerly the Directorate-General for Competition Policy, Consumer Affairs and Fraud Control (the "DGCCRF"), as specified in a Recommendation to economic agents in JORF no. 159 of July 10, 2004, p. 12574.

49 As provided by Order of September 9, 2004, "*portant application de l'article L. 221-1-3 du code de la consommation*," in JORF no. 224 of September 25, 2004, p. 16560.

50 This application form is available online at <https://webgate.ec.europa.eu/gpsd-ba>. The Commission has also issued guidelines on how to prepare and submit this notification form. These guidelines are available at <https://webgate.ec.europa.eu/gpsd-ba/help.pdf> (web sites last visited August 10, 2012).

51 RAPEX is the EU rapid alert system for all dangerous consumer products, with the exception of food, pharmaceuticals, and medical devices.

- Order temporary emergency measures, such as temporary recall or withdrawal, should there be a serious or immediate risk for consumers (Article L. 221-5 of the French Consumer Code⁵²).

INSURANCE

Except for certain regulated professions and in the construction industry, French companies are not obliged to have general civil liability insurance. However, most French companies obtain insurance policies to cover both professional civil liability and risks arising from commercial operations. These insurance policies usually cover personal injury and property damage claims from product liability, subject to specific exclusions. They may also include other costs that may arise, such as product recall costs.

PRACTICAL ISSUES

When a U.S. company decides to distribute products in Europe through a subsidiary or independent distributors, it is important for the company to coordinate with its subsidiary or independent distributors for the purpose of monitoring product safety. Coordination is also key for the purpose of notifying the European authorities of any risk identified by the producer or distributor and then acting to remediate and prevent any risk.

A distributor may decide to join a foreign producer in proceedings initiated in France to share liability in case of an unfavorable decision against the distributor. In such case, the producer will also be ordered to pay damages to the injured person or buyer or to indemnify the distributor.

52 "In the event of grave or immediate danger, the Minister for Consumer Affairs and the other minister(s) concerned may, via a joint order and for a period not exceeding one year, suspend the manufacture, importation, exportation and availability of a product, and its general withdrawal or destruction if there is no other means of eliminating the danger, regardless of whether it is provided free of charge or in return for payment. They are also empowered to order the distribution of warnings or precautions for use, and recall of the product for exchange or modification or full or partial reimbursement.

"In the same circumstances, they may also suspend provision of a service.

"Such products and services may be relaunched when they are found to be compliant with the applicable regulations.

"The Minister for Consumer Affairs and, where applicable, the other minister(s) concerned, shall hear the professionals concerned without delay and not later than fifteen days after a decision to suspend has been taken. They shall also hear the approved national consumer associations.

"The said orders shall stipulate the conditions under which the costs associated with the safety measures to be taken pursuant to the provisions of the present article shall be borne by the manufacturers, importers, distributors or service providers.

"The said orders may be renewed via the same procedure for further periods each not exceeding one year."

CLASS ACTIONS IN EUROPE: REALITY OR MYTH? THE EXAMPLE OF FRANCE

Structural hurdles in the French legal system, such as the difficulty faced by claimants attempting to collect evidence, the principle of strict compensation for injury, and the impossibility for victims to call upon a plaintiffs' bar, have always been a significant obstacle for groups of individuals seeking to take an active part in damage litigation in France.

Nevertheless, the improved organization of consumer associations, together with a growing desire to bypass these obstacles (or at least reduce their impact), has at long last enabled the development of collective redress in France. These changes have taken the form of a more appropriate use of existing procedural tools to compensate for the "information asymmetry" between plaintiffs and defendants in damage claims, as well as a more sophisticated approach by judges to highly technical legal areas, such as antitrust, securities, and the environment.

With regard to antitrust, France, like most other EU Member States, can produce few examples of antitrust damage claims. Consequently, the Commission of the European Union (the "Commission") has been resolutely pushing for the development of collective redress in antitrust and consumer matters. Indeed, the Commission's recent actions in this area had until recently been mainly carried out by its Directorate-General for Competition and its Directorate-General for Health and Consumers. The European Parliament, following a joint consultation carried out by both Directorates-General in 2011, adopted a resolution on February 2, 2012, welcoming the establishment of non-sector-specific common principles.

In the field of securities, procedures for redress available to investors under French law are limited to approved investor organizations acting on behalf of a pool of investors, as opposed to individual shareholders (*action dans l'intérêt collectif*), or, alternatively, on behalf of individual holders for losses they suffered directly (*action en représentation conjointe*). Still, three landmark cases, the *Sidel* case in 2006, the *Regina Rubens* case in 2007, and the *Gaudriot* case in 2010, illustrate the French courts' movement toward recognizing proper shareholder claims for damages.

Finally, as far as environmental law is concerned, only group actions restricted to certain environmental associations are currently possible in France. It is generally acknowledged, however, that the adoption in 2005 of Law No. 2005-265, which created the Charter for the Environment, and in 2008 of Law No. 2008/757, which deals with environmental liability,

has enhanced the development of larger group actions and that this also may represent a path toward the introduction of proper class actions in the future.

All in all, these recent initiatives in matters involving widespread injury have led to serious consideration, for the first time in decades, of the introduction of class actions into the French legal system.

Indeed, following years of discussion without significant progress, the introduction of class actions into the French legal system is now back on the political agenda. In 2007, then President Sarkozy launched a project aimed at introducing a class-action system for consumers. None of the various draft bills made its way through to final adoption. However, the newly elected Socialist government announced on September 10, 2012, that a new draft bill introducing class actions in France would be discussed in the spring of 2013. The Minister of the Economy stated that the government wants "a balanced consumer protection bill that will strengthen the rights of consumers without penalizing economic activity." The details of any future bill are not yet known.

Be that as it may, the current context supporting the development of collective redress in France—and in Europe as a whole—is expected to have a positive influence on judges facing damage claims in matters involving injury sustained by a wide range of persons. Indeed, judges may be tempted to take the lead in an area where politicians have thus far failed to meet consumers' expectations.

This article will discuss the shortcomings of the procedural issues that arise under French law in general, as well as an analysis of specific areas of law where changes have been observed over the past few years—antitrust claims by consumers, securities law, and environmental law.

LIMITED ROOM FOR LUCRATIVE DAMAGE CLAIMS OR SUITABLE COLLECTIVE REDRESS UNDER FRENCH LAW

AN UNFAVORABLE TRADITION

France has no tradition of introducing consumer claims and litigating on one's own account. This is due primarily to the existence of approved consumer associations, which are officially designated by the government as representatives of consumers' general interests.¹ But there are also several structural hurdles in the French legal system that deter consumers from taking an active part in damage litigation. These are mainly related to the difficulty of gathering and presenting evidence, the principle of strict compensation for injury, and the prohibition against canvassing for victims under French law.

The first major hurdle is the difficulty faced by a claimant attempting to collect the evidence necessary to prove both the existence of a wrongdoing and the extent of his or her injury. Indeed, the claimant has limited access to useful information, which is generally in the hands of the defendant, provided he or she is even aware of its existence. Moreover, estimating and substantiating the injury for which compensation is claimed can be extremely difficult, not just for the claimant but for the judge as well.

Another factor discouraging damage claims in France is the principle of strict compensation for injury, a cornerstone of French law. In the French system, judges are required to determine the exact amount of the actual harm caused by a wrongdoing and are allowed to grant damages to claimants only to that extent. As a result, when balancing the costs and benefits of a damage claim, a potential claimant, such as a consumer, often comes to the conclusion that the cost of pursuing the claim will exceed any potential compensation, particularly if the claimant's injury was not substantial. This is reinforced by the fact that a claimant normally receives only a lump-sum

compensation for legal costs, which often fails to cover the full amount of actual expenses.

Finally, injured persons in France do not directly form plaintiffs' classes before the courts. Given that there is no such thing as a plaintiffs' bar in France and that French legal rules prevent lawyers from canvassing for injured persons, it is difficult for an injured person to bring a claim before a court. A potential claimant may not even know that there is litigation in progress in which he or she could claim damages.

The factors hindering efficient collective redress in France can be seen in the *www.Classaction.fr* case. In 2005, a group of lawyers tried to introduce a class-action type of procedure before a national court in France through its web site, *classaction.fr*. The group began canvassing for injured persons to organize a procedure. In June 2005, however, the Lille civil court issued an injunction requiring the group to remove from its web site any advertising violating the principle prohibiting canvassing for persons injured by wrongdoing.² In December 2005, the Paris civil court decided on the merits of the case that the offer of services proposed by *Classaction.fr* constituted illegal canvassing, and it concluded that the practices in question (which extended beyond canvassing to include such things as whether the information provided to the consumer was sufficient) had harmed consumers' collective interest.³ The complaint had been lodged by UFC-Que Choisir, the main approved consumer association in France. In September 2007, the Paris civil court also dismissed 699 plaintiffs in a litigation in which damages were claimed against film studios that had put anti-copy systems on DVDs. The court, observing that these 699 consumers had been illegally canvassed through the *Classaction.fr* web site, dismissed them all, pursuant to the principle of *fraus omnia corrumpit*.⁴

THE CURRENT TREND TOWARD CORRECTING THE "INFORMATION ASYMMETRY" BETWEEN THE PLAINTIFFS AND DEFENDANTS IN DAMAGE CLAIMS AND A MORE SOPHISTICATED APPROACH TOWARD TECHNICAL LITIGATION

The general view is that the French legal system does not facilitate, and may completely prevent, the creation of classes in litigation for damages.

1 Under Articles L. 421-1 et seq. of the French Consumer Code, approved consumer associations are entitled to "exercise the rights conferred upon civil parties in respect of events directly, or indirectly, prejudicing the collective interest of consumers."

Under Article L. 421-2 of the French Consumer Code, approved consumer associations are entitled to "ask the civil court, ruling on civil actions, or the criminal court, ruling on civil actions, to order the defendant or the accused, where appropriate subject to penalty, to take any measure intended to stop illicit actions or to remove illicit clauses from a contract or a standard contract offered to consumers."

2 T.G.I. Lille [Lille Civil Court], June 14, 2005 (summary order).

3 T.G.I. Paris [Paris Civil Court], Dec. 6, 2005. This judgment was confirmed by the Paris court of appeal (*Cour d'appel de Paris*) in a ruling dated October 17, 2006, and then by the French Civil Supreme Court (*Cour de cassation*) in a ruling dated September 30, 2008.

4 T.G.I. Paris [Paris Civil Court], Sept. 19, 2007.

Still, observers have noticed a recent trend to alleviate the higher French hurdles to the development of collective redress, mainly through the use of existing procedural tools to correct the “information asymmetry” that exists between the parties, along with a more sophisticated approach in judges’ handling of technical litigation, such as in antitrust, securities, and environmental matters.

The most significant impetus for French class actions was provided by the European Court of Justice (the “ECJ”). In a judgment rendered in September 2006, following the request for a preliminary ruling by the French Civil Supreme Court (*Cour de cassation*) in connection with an antitrust damage claim brought by Laboratoires Boiron SA against the French central agency for social security bodies, the ECJ decided that Member States are required to make full use of any existing rules to permit persons injured by anti-competitive practices to exercise effectively their right to compensation for damage. In this particular case, the ECJ pointed to rules and principles that regulate production of evidence in cases involving information asymmetry (i.e., those in which the claimant has no access to information or data that would support his assertions). In its judgment, the ECJ stated that if a judge believes that requiring a claimant to prove an anticompetitive practice (in this particular case, the existence of State aid)

is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such [claimant] will not have, the [judge] is required to use all procedures available to [him] under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.⁵

Article 10 of the French Code for Civil Procedure (the “CCP”) already grants French judges authority to order any investigatory measures (*mesures d’instruction*) legally permissible, even in the absence of any such request by the parties to the litigation. Although there is no Anglo-Saxon type of discovery procedure in France, investigatory measures such as the ones to which the *Boiron* ruling referred are available under French law. Indeed, judges may order third parties (Article 138 CCP) as well as the parties themselves (Article 142 CCP) to provide evidence in their possession; more generally, they may order any investigatory measures they consider necessary (Articles 143 and 144 CCP). Such measures, available to any judge in any litigation in France, may help reallocate more evenly the burden of evidence between the parties in a damage litigation. These proceedings are efficient because, even if the parties cannot be held criminally liable in the event that they fail to provide the requested evidence (contrary

to the Anglo-Saxon discovery procedure), the judge may pressure them to cooperate by imposing a periodic penalty payment. Assuming that the requested evidence is not submitted, the judge will draw any conclusions from the abstention or refusal of the party (Article 11 CCP).

Besides the facilitation offered to claimants by the *Boiron* case, the French system offers certain instruments that may be useful to persons injured by illicit practices who are faced with an imbalance of information. Notably, Article 145 CCP states:

[I]f there is a legitimate reason to preserve or to establish, before any litigation, the evidence of the facts upon which the resolution of a dispute could depend, legally permissible investigatory measures may be ordered on request of any interested party, by way of a petition or by way of a summary procedure.

Because the investigation takes place before any proceeding on the merits has begun, an Article 145 CCP proceeding is particularly efficient. In practice, a person injured by wrongdoing asks the judge to order a visit to locations where evidence is expected to be found. The visit is conducted by a bailiff (*huissier*), assisted by computer and accounting experts if necessary, who searches for and copies documents that could be used in future litigation. When ordered by way of an *ex parte* petition, investigatory measures are initiated under Article 145 CCP before the defendant is even aware of the upcoming litigation.

In conclusion, notwithstanding the lack of discovery procedures in France, the proceedings laid down by the French CCP are efficient enough to alleviate, at least in part, the “information asymmetry” that normally exists between the plaintiffs and the defendants. However, the French system is less advantageous to claimants than its U.S. counterpart, inasmuch as claimants must identify the specific documents for which they request the judge to order access.

Basically, the French legal system does not currently provide effective and equitable compensation for a group of injured persons who have incurred an economic loss. Claimants bear the burden of evidence with respect to the fault, the injury, and the link between the two and, when successful, obtain only strict compensation for their injury.

Nevertheless, despite the absence of a plain-vanilla class-action regime in France, there are ways to obtain a sort of collective redress in matters involving a group of injured persons in areas such as antitrust claims made by consumers, securities, and the environment.

5 European Court of Justice, Sept. 7, 2006, *Laboratoires Boiron v. ACOSS*, C-526/04, ECR I-7529, para. 55.

AREAS OF LAW WHERE CHANGES HAVE ALREADY BEEN OBSERVED

ANTITRUST CLAIMS MADE BY CONSUMERS

The very nature of competition law, which generally involves fact-oriented reasoning and economic analysis, makes evidence particularly crucial in antitrust cases—and also makes it difficult to obtain. Consequently, there is a real deterrent to antitrust damage claims brought by French consumers. Even approved consumer associations, which supposedly represent consumers' general interests, are not significantly involved in antitrust litigation.⁶

Under French Law, Consumers Are Often Discouraged From Bringing Damage Claims in Antitrust Matters

It is extremely difficult for consumers to bring a successful action for antitrust damages before a court. Even if claimants were successful in proving the existence of an infringement (notably in follow-on actions, subsequent to the decision of a competition authority condemning the practice at issue), they must still demonstrate the link between the practice and their claimed loss. They also have to quantify their loss, which is very difficult in antitrust cases. In this respect, the Commission states:

To establish their damage, claimants have to compare the anti-competitive situation to a situation which would have existed in the absence of the infringement, i.e., a hypothetical competitive market. In a breach of contract case, a claimant can normally use market prices at the time of the breach of contract as the benchmark for calculating his loss. However, in a typical competition case, the claimant cannot rely on the prices at the time of the infringement and has to establish what the price would have been in the absence of the restriction of competition. For this purpose, he will often depend on information that is in the sphere of the defendant and possibly their partners in the infringement: for example, notes on the price overcharges agreed secretly between cartel members, details on how and when they influenced price and other parameters of competition, or internal documents of the infringer showing his analysis of market conditions and developments. Also the reconstruction of a hypothetical competitive market

to quantify the damage caused by the infringer usually presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market.⁷

An action brought by consumers in France as a follow-on to the mobile phone operators' cartel case could have been a good example of an antitrust damage claim, but its eventual dismissal illustrates the procedural hurdles placed by French law upon representative associations. In November 2005, the French Competition Council imposed a €534 million fine on the three French mobile phone operators for unlawful exchange of information that led to an increase in prices.⁸ In this case, consumers could avail themselves of both the decision of the French Competition Council finding anticompetitive practices and the direct link between these practices and their actual loss. In December 2007, UFC-Que Choisir introduced an *action en représentation conjointe* (action in joint representation) before the Paris commercial court. The proceedings have brought together more than 12,000 individual complaints. The unusually high number of consumer claims in the mobile operators' cartel case is most probably due to two circumstantial factors. First, in this case, the claimants benefit from the French Competition Council's decision, lightening their burden of evidence with respect to the companies' misbehavior. Second, this case was an extremely high-profile one. Indeed, the fine imposed by the French Competition Council on the mobile phone operators was exceptionally high by French standards. Because of the "everyday life" character of the sector concerned, there has been intense consumer awareness on a very large scale, as potentially every mobile phone owner in France was a victim of the cartel (i.e., approximately 30 million people). The downside is that, at the consumer level, the actual loss is spread out among a multitude of consumers, as is often the case in antitrust matters. In fact, each claimant had a relatively small economic loss (the average per capita damage was estimated at €60). In any event, every claimant would be granted limited damages, as under French law judges are required to award only strict compensation for the actual injury.

The claim was dismissed in December 2007 by the Paris commercial court and in January 2010 by the Paris court of appeal,⁹ as both courts considered that UFC-Que Choisir had breached French rules that prohibit one person from

6 During the 1997–2008 period, only 28 cases and four requests for an opinion were lodged by consumer associations before the French Competition Council (*Conseil de la concurrence*) (replaced by the Competition Authority, established in March 2009). No more recent statistics are available to date. Individual consumers are not permitted to appear before the Competition Authority, which in any case cannot grant damages.

7 *Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, para. 89, SEC (2008) 404.

8 Decision No. 05-D-65, Nov. 30, 2005. Confirmed by the Paris court of appeal (*Cour d'appel de Paris*) on December 12, 2006, then appealed to the Civil Supreme Court (*Cour de cassation*), which remanded the case on June 29, 2007, to the Paris court of appeal. On March 11, 2009, the Paris court of appeal rejected the appeal.

9 TC Paris [Paris Commercial Court], Dec. 6, 2007, *UFC-Que Choisir v. Sté Bouygues Télécom*, no. 2006057440; CA Paris [Paris Court of Appeal], Jan. 22, 2010, *UFC-Que Choisir v. Sté Bouygues Télécom*, no. 08/09844.

soliciting another in order to incite such person to act before the courts. The French Civil Supreme Court (*Cour de cassation*) agreed with the lower court's conclusion.¹⁰ This case illustrates one of the major hurdles that class actions face in France.

However, a first step toward a more sophisticated approach to damage claims stems from the ECJ's *Boiron* ruling. The judge is now required, when dealing with an antitrust case, to use investigatory measures where he or she finds it impossible or excessively difficult for the claimant to produce fundamental evidence held by the defendant or a third party. This undoubtedly grants new opportunities for claimants in antitrust litigation, which is generally characterized by asymmetric information between consumers/plaintiffs and companies/defendants.

Another step toward a more sophisticated approach to damage claims in France had already been taken in December 2005, when the government adopted a decree designating specialized courts throughout the French territory to exercise exclusive regional jurisdiction over litigation in antitrust, intellectual property, and restructuring.¹¹ In each of these technical areas, judges must have an appropriate understanding of any nonlegal issues (such as economics and accounting) that are inextricably linked to the proper implementation of legal provisions. This is a prerequisite for a fair outcome of such litigation and, where the case allows, for a suitable award of damages. With respect to litigation relating to anticompetitive practices, eight civil courts (*Tribunal de grande instance*) and eight commercial courts (*Tribunal de commerce*) have been designated. Because of this specialization, it is likely that the judges of these courts will increase their "antitrust awareness" and improve their ability to deal with the technical economic issues of antitrust damage claims.

The Impetus Given by the Commission for the Introduction of Collective Redress in EU Member States

The Commission provided the first impetus for the concept of class action in its Green Paper on Damages Actions for Breach of the EC Antitrust Rules in 2005.¹² In 2008, it went further by issuing a White Paper on Damages Actions for Breach of the EC Antitrust Rules¹³ and a Green Paper on Consumer Collective Redress,¹⁴ both of which mentioned the need for Member States to introduce a class-action procedure into their legal systems. In 2009,

the Commission informally circulated a draft proposal for a directive, together with an explanatory memorandum, that delineated more precisely the legal framework and boundaries of the right to damages of parties impacted by a violation of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

At this stage of the process, the Commission already stated that a U.S.-style class action was not envisaged. The "toxic cocktail" of the U.S. system (i.e., the combination of contingency fees, punitive damages, pretrial discovery, and opt-out systems) should not be introduced in Europe. In all drafts, the Commission recommended the implementation of two mechanisms of collective redress: representative actions brought by qualified entities on behalf of identifiable injured persons, on the one hand, and opt-in collective actions, in which injured persons combine their individual claims into a single action, on the other.

Until the end of 2009, the Commission's Directorates-General for Competition and for Consumer Protection followed two independent paths, and concerns emerged that different responses in different fields of EU law could lead to inconsistent results. In response to those concerns, in February 2011, the Commission launched a horizontal public consultation entitled "Towards a Coherent European Approach to Collective Redress"¹⁵ to determine whether it was necessary, desirable, and legally possible to create a coherent European approach to collective redress. The consultation process generated more than 19,000 submissions by consumers and companies/organizations.¹⁶

The European Parliament then adopted a resolution on February 2, 2012,¹⁷ calling on the European Council, the European Commission, and the various Member States to work together toward the creation of a coherent European approach to cross-border collective redress. Parliament is concerned that uncoordinated EU initiatives in the field of collective redress will result in a fragmentation of national procedural and damages laws, which would weaken access to justice. It therefore calls for a horizontal framework that would include a common set of principles providing uniform access to justice via collective redress within the EU and specifically—but not exclusively—dealing with the breach of consumer rights. As far as substance is concerned, Parliament's resolution contains five elements. First, the action would be admissible only if there is a group

10 *Cour de cassation* [French Civil Supreme Court], May 26, 2011, *UFC-Que Choisir v. Sté Bouygues Télécom*, no. 531, 10-15.676.

11 Decree No. 2005-1756, Dec. 30, 2005, *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* no. 304, Dec. 31, 2005, p. 20831.

12 *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005).

13 *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 final (Apr. 2, 2008).

14 *Commission Green Paper on Consumer Collective Redress*, COM (2008) 794 final (Nov. 27, 2008).

15 *Commission Staff Working Document—Public Consultation: "Towards a Coherent European Approach to Collective Redress,"* Feb. 4, 2011, SEC (2011) 173 final.

16 *European Commission, Directorate-General Justice, Public Consultation: "Towards a Coherent European Approach to Collective Redress,"* available at http://ec.europa.eu/justice/news/consulting_public/news_consulting_0054_en.htm (all web sites herein last visited September 23, 2012).

17 *European Parliament, Resolution of Feb. 2, 2012, on "Towards a Coherent European Approach to Collective Redress,"* P7_TA(2012)0021.

identified prior to the claim's being brought; a judge would be able to confirm that the qualifying criteria are met. Second, the procedure would be on an opt-in basis. Third, contingency fees would not be permitted. Fourth, claimants could obtain only strict compensation for the damage incurred. Fifth, the "loser pays" principle would apply.

Finally, the European Commission's Work Programme 2012 announces a horizontal "EU framework for collective redress" for the end of the year 2012 and a specific legislative initiative on actions for damages for breaches of antitrust law. It would have two main objectives: (i) to ensure effective damages actions before national courts for breaches of EU antitrust rules; and (ii) to clarify the interrelation of such private actions with public enforcement by the Commission and the National Competition Authorities—particularly as regards the protection of leniency programs—so as to preserve the central role of public enforcement in the EU.¹⁸

Any EU legislation will have to comply with the principles set in Article 5 of the Treaty on European Union: (i) proportionality (i.e., not going beyond what is necessary in order to achieve a stated objective); and (ii) subsidiarity (i.e., the fact that the effectiveness of EU law requires action to be taken at the EU level and not at the national level).

SECURITIES CLASS ACTIONS

While efforts to introduce collective actions in France have historically focused on class actions for the protection of consumer interests, various waves of legislative action have grappled with the same question with respect to securities laws. The ambivalence of French public opinion has been reflected in the fact that no final legislation has been adopted in this area. Resistance to the adoption of a class-action procedure under the securities laws centers generally on the idea that, because investing is inherently risky, investors assume the risk of loss when they buy or sell securities. Further, issues have been raised with respect to injury, in both the basic definition of "injury"—i.e., whether loss of value can constitute real injury—and, to the extent that it can, how to measure that injury in a reliable way.

The Development of a Securities Class Action in France

Since 1994, securities investors in France have had a right of action against management if the action is brought by investor organizations in an *action en représentation conjointe*. Investors can also bring an *action dans l'intérêt collectif*, which allows certain approved investor organizations to initiate proceedings, including a civil action in connection with a criminal case, with respect to events

that directly or indirectly harm the collective interest of shareholders of the same listed company. However, further attempts to expand investor rights as part of the 2003 Financial Security Law (*loi de sécurité financière*) proved unsuccessful. The French upper chamber of Parliament, the *Sénat*, rejected a proposal to recognize the losses of individual investors as separate and distinct from losses incurred by the company itself. Instead, the *Sénat* simplified the procedures for approving investor organizations that can bring actions under the preexisting procedures.

The subject of class actions resurfaced during the drafting of the more recent Economic Modernization Law (*loi de la modernisation de l'économie*), adopted on August 4, 2008, although only with respect to consumer law. The final law, aimed at increasing the attractiveness of the French market, remained decidedly silent on the topic of class actions for consumers and investors alike.

Class actions were also proposed in 2008 in the report prepared by the commission headed by Jean-Marie Coulon (the "Coulon Report"). It reviewed possible reform of the way criminal law applies to companies and their directors and senior managers. In line with previous debates and proposals on the subject, the Coulon Report considered class actions appropriate only in the context of consumer law and rejected their application in the context of shareholder litigation.

Following this proposal, the French government announced that it was not against the introduction of class actions in France, provided that the corporate legal environment is reformed first. As noted in the Coulon Report, the French government's view is that class actions will be beneficial only when fully compatible with the general principles of French law and only if they do not harm economic stability and do not lead to the excesses and abuses observed in other jurisdictions. The subject is expected to be revisited during debates on the proposed decriminalization of company law when a new law is introduced to Parliament.

Procedures for Redress Available to Investors Under French Law

Articles L. 452-1 et seq. of the French Monetary and Financial Code provide for two types of collective actions. In an *action dans l'intérêt collectif*, an approved investor organization brings the proceeding on behalf of the investor pool itself rather than any individual shareholder. The investor organization must either: (i) meet strict requirements related to shareholding and have filed its bylaws with the French securities regulator, the *Autorité des marchés financiers* (the "AMF"); or (ii) be approved

¹⁸ Commission Work Programme 2012, available at http://ec.europa.eu/atwork/pdf/cwp2012_en.pdf, and Planned Commission Initiatives until the end of 2012, available at http://ec.europa.eu/atwork/pdf/forward_programming_2012.pdf.

by the AMF after showing that it was created at least six months earlier, has a minimum of 200 members, and fulfills various requirements with respect to expertise and ethics. Any damages awarded in a case are paid to the investor organization, not the individual shareholders.

More commonly, an action is brought as an *action en représentation conjointe*. Any approved organization, as described above, may jointly represent two or more security holders who seek damages against the same defendant. As opposed to the *action dans l'intérêt collectif*, such actions are brought on behalf of the holders themselves for their own loss. Therefore, the damages and interest that the defendant is ordered to pay, if found liable, must be paid to the investor-plaintiffs, since the only purpose of this suit is to receive compensation for individual loss. If the suit fails, the investor-plaintiffs lose their individual right of recourse.

Representative organizations must operate on behalf of the investor-plaintiffs under power of attorney. While the law prohibits investor organizations from canvassing for potential plaintiffs, in certain civil or commercial cases, the president of either the civil court of first instance (*Tribunal de grande instance*) or the commercial court (*Tribunal de commerce*) may authorize canvassing. In such case, the investor organization may seek powers of attorney from potential claimants through various means of communication.

Recent Trends to Compensate Persons Injured by Securities Violations

Three recent cases provide examples of an *action en représentation conjointe* and illustrate what appears to be a move by French courts toward recognizing shareholder injury. In these cases, the courts seemed to identify damage to shareholders that was distinct from the injury sustained by the company which issued the securities. The courts used alternate theories for evaluating shareholder injury in the absence of legislative guidance on the subject.

In the 2006 *Sidel* case, the Paris criminal court (*Chambre correctionnelle du Tribunal de grande instance de Paris* sitting as the French criminal court of first instance) held *Sidel's* management criminally liable for preparing false accounting figures, disseminating false and misleading information about the company, and insider trading.¹⁹ The court also held the company criminally liable on the basis of *respondeat superior*. More than 700 shareholders, represented by two investor organizations, joined the criminal action through a French procedure allowing shareholders

to join criminal cases as civil plaintiffs. The civil plaintiffs were heard on the first two claims.

Shareholders had to overcome two obstacles in order to prevail in their claims against *Sidel's* management. In a civil action, in order to hold a manager personally liable, shareholders normally must prove that the manager acted outside the scope of his employment; however, because the claim was brought before a criminal court, this element of proof was not necessary.

Shareholders must also prove their individual harm. A decrease in share price has long been considered by the court as a collective injury to the company, with the shareholder merely having an indirect injury. The innovation of the *Sidel* court, however, was to evaluate injury on a theory of lost opportunity to invest or divest. Under current jurisprudence, the mere fact that investors sold their shares at a loss has not in and of itself caused injury, since stock prices are by nature speculative. However, the court argued, false or misleading information, which led investors to believe that *Sidel's* financial situation and opportunities were better than in reality, caused them to invest in or keep shares whose real value was inferior to the actual stock price. In other words, had the investors been better informed, they might not have purchased *Sidel's* shares in the first place or might have sold the shares they did hold. This loss could then be compensated.

One of the difficulties that courts face in securities claims, however, is the valuation of the injury, particularly when the court must evaluate, as in this case, the relationship between false or misleading information communicated to the market and an investor's decision to invest or divest in the shares. The *Sidel* court elected to grant a fixed amount of €10 per share in damages to the 700 shareholders, which amounted to a total of €1,897,031.

The judgment on the civil-law questions was appealed. The Paris court of appeal affirmed the judgment,²⁰ ruling that the shareholders lost an opportunity to make an informed decision. It also affirmed the damages awarded with regard to this "lost opportunity," without making any further remarks on how the damages were or should have been calculated. Several parties to the case filed an appeal before the Supreme Court (*Cour de cassation*), but as of the time of publication, no decision has been handed down.

In a similar case, the Paris criminal court (*Chambre correctionnelle du Tribunal de grande instance de Paris* sitting as the French criminal court of first instance) evaluated

19 T.G.I. Paris [Criminal Chamber of the Paris Civil Court], 11e ch/1, Sept. 12, 2006, *Sidel*, no. 0018992026.

20 CA Paris [Paris Court of Appeal], 9e ch., Sect. B, Oct. 17, 2008, *Sidel*, no. 06/09036.

damages in a different manner.²¹ In this case, shareholders of the clothing company Regina Rubens joined as civil plaintiffs in the criminal proceedings held before the same court that decided the *Sidel* case, alleging dissemination of false information by the company. The court also agreed to hear the claims of a shareholder's association, brought on behalf of the association itself, as well as those of the company brought by its new owner. The court confirmed the ruling in *Sidel* and awarded damages to shareholders on the same lost-opportunity theory. One major difference with the *Sidel* case is that the court elected to award differing amounts of damages, based on the time when the investor-plaintiff acquired the shares. For each shareholder who had purchased shares at the beginning of the fraud (which lasted over a period of several years), the court awarded a lump-sum payment equal to one-half of the purchase price. For shareholders who had acquired shares "in the heart of the fraud," the court assessed damages based on actual loss, calculated as the difference between the purchase price and the share price on October 20, 2006.

In the end, however, the damages awarded were relatively small in comparison with those awarded in U.S. securities class actions: the five largest shareholders together received a total of less than €8,000. The court awarded the investor organization, the Association for Small Shareholders (*Association des petits porteurs actifs*, or "APPAC"), a symbolic €1 for moral damages. On appeal, the Paris court of appeal affirmed the lower court's analysis with respect to the individual shareholders.²²

More recently, shareholders of Gaudriot brought legal action against the former president and former members of the company's management board on the grounds of *in solidum* civil liability, arguing that the shareholders had invested in and continued to hold the company's shares on the basis of false information and misleading financial statements published by the company's management.²³ Pursuant to Article L. 225-251 of the French Commercial Code, management board members and the managing director of a company are individually and severally liable, as the case may be, toward the company or toward third parties, for any breach of laws and regulations applicable to *sociétés anonymes*, the company's articles of association, or any error by the company's management (*faute de gestion*).

Under a 2003 landmark case of the Commercial Supreme Court,²⁴ in order to hold a manager personally liable on the grounds of *in solidum* civil liability, shareholders must

prove that the manager acted outside the scope of his employment. This condition is met if the manager intentionally committed a serious error (*faute intentionnelle d'une particulière gravité*) incompatible with the normal performance of his employment.

Since *Sidel* and under current jurisprudence, the lost opportunity to invest or divest because of false financial information provided by the company's management constitutes an individual harm directly sustained by shareholders; this harm is held to be distinct from the company's injury.

The Commercial Supreme Court, in a significant new approach, held that the company's management (i.e., its managers, including the members of the management board) are personally liable for all the actionable decisions in which they participate, provided shareholders have proved their individual harm. Shareholders are no longer required to prove that the managers intentionally committed a serious error (*faute intentionnelle d'une particulière gravité*) incompatible with the normal performance of their employment. Each board member must therefore prove no participation in the challenged management decision and active opposition of this decision, in order to evade the *in solidum* liability of board members. Abstention is no longer adequate.

In its ruling, the Commercial Supreme Court remanded part of the case to the Poitiers court of appeal, whose decision is still pending, only with respect to the award of damages to the plaintiffs. Nevertheless, the ruling in the *Gaudriot* case was confirmed a few days later in a similar decision issued by the French Commercial Supreme Court.²⁵ The *Gaudriot* case creates the opportunity for shareholders to obtain the *in solidum* liability of members of a company's management board in case of false information published by the management. It may foster more shareholders' claims for damages, especially when board members are legal entities, as is possible under French law, with adequate financial resources.

Although these cases are quite different from class actions as they are known in the United States, organizations defending shareholder rights believe that these decisions could be applied in larger cases, resulting in higher damages. Already, shareholders are increasingly bringing suit in French courts through the approved investor organizations in order to obtain damages. For example, in 2009, an investor organization filed a complaint against the French

21 T.G.I. Paris [Criminal Chamber of the Paris Civil Court], 11e ch/1, Jan. 22, 2007, *Mmes X et Y, société Regina Rubens SA, société LV Capital, Association des petits porteurs actifs (APPAC) et al.*, no. 0106896030.

22 CA Paris [Paris Court of Appeal], 9e ch., Sect. B, Sept. 14, 2007, no. 07/01477.

23 Ch. Commerciale de la Cour de Cassation [Commercial Supreme Court], March 9, 2010, no. 08-21547 *Sté EPF Partners v. Abela*.

24 Ch. Commerciale de la Cour de Cassation [Commercial Supreme Court], May 20, 2003, no. 99-17092, *Mme Nadine X v. SA SATI*.

25 Ch. Commerciale de la Cour de Cassation [Commercial Supreme Court], March 30, 2010, *Fonds de Garantie des dépôts v. Société caribéenne de conseil et d'audit*.

bank Natixis for false information, misleading financial statements, and artificially inflated dividend distributions. French shareholders have also been seeking redress through other means, in particular given that U.S. courts are not available to hear most of their claims, following U.S. precedent in the *Vivendi* case.

In that case, French investors who purchased Vivendi shares on the French stock exchange brought securities claims against the company in the United States. The plaintiffs alleged that Vivendi misled shareholders about its financial condition between 2000 and 2002. On March 22, 2007, the United States District Court for the Southern District of New York allowed the French shareholders to join the U.S. class action.

In parallel and in order to prevent French shareholders from joining the U.S. class actions, Vivendi brought a legal action against them in France. In April 2010, the Paris court of appeal²⁶ dismissed Vivendi's claims that the French shareholders had committed an abuse of their right to institute legal proceedings and abusive forum shopping by joining as plaintiffs in the U.S. class action against Vivendi.

However, on February 22, 2011, following the U.S. Supreme Court decision in *Morrison*,²⁷ the New York district court judge ruled that foreign shareholders who purchased securities on a foreign stock exchange could not bring securities fraud claims in a U.S. court. It therefore dismissed the claims of the French petitioners who had purchased Vivendi ordinary shares in France. After the 2011 U.S. decision, the amount of potential punitive damages to be paid by Vivendi was reduced by approximately 80 percent, according to the company's management.

While many observers had believed that the U.S. class-action procedures could provide certain relief for French shareholders, the *Morrison* and *Vivendi* decisions remove this option for French shareholders.

ENVIRONMENTAL GROUP ACTIONS

The environmental, health, and safety field is typically an area suited for class actions. Because of the specific nature of environmental damage (either to the collective interests of the injured persons or to the environment itself),

class actions could be an appropriate solution for the indemnification of such damage. Indeed, such damage can easily lead to harmful consequences that are similar for a broad range of persons and thus generate mass claims.

Mass environmental claims could be filed after major industrial accidents or pollution by oil spills or toxic waste. For example, the *Amoco Cadiz* and *Erika* shipwrecks resulted in claims from a large number of "persons" (i.e., natural persons, associations, and companies). The Toulouse chemical plant explosion²⁸ in September 2001 also resulted in claims from a multitude of persons.

During the debates before the *Sénat* on Draft Bill No. 3508, presented by the French government on June 1, 2011, concerning the strengthening of the rights, protection, and information of consumers, a new chapter was added to introduce class actions in France. However, the bill did not include environmental class actions. Unsurprisingly, several senators proposed to extend the scope of the amendment to damage claims deriving from a violation of environmental law. Nevertheless, this proposed extension was rejected on December 22, 2011. The latter draft bill was never adopted, and no information is currently available on the scope of the next draft bill on class actions, expected for the spring of 2013. At present, the introduction of environmental class actions therefore remains at issue.

Today, French law permits group actions limited to certain environmental associations to address damage both to persons (such as nuisance, loss of property value, and health damage) and to the environment itself.

Damage to Persons

Under applicable French environmental laws, particularly Article L. 142-2 of the Environmental Code, certified environmental associations are entitled to "exercise the rights recognized as those of the civil party with regard to acts which directly or indirectly damage the collective interests that they defend and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment."²⁹ Furthermore, Article L. 142-3 of the Environmental Code allows "several identified persons [who] have suffered individual damages caused by the act of a single person and with a common origin" to mandate any certified environmental association to "seek redress before

26 CA Paris [Paris Court of Appeal], April 28, 2010, no. 168.

27 Supreme Court of the United States, no. 08-1191, *Morrison v. National Australia Bank Ltd*, June 24, 2010.

28 An explosion occurred on September 21, 2001, at an industrial plant that produces chemicals and is located in the vicinity of Toulouse, France.

29 Article L. 142-2 of the Environmental Code states: "The certified associations mentioned in Article L. 141-2 may exercise the rights recognized as those of the civil party with regard to acts which directly or indirectly damage the collective interests that they defend and which constitute an infringement of the legislative provisions relating to the protection of nature and the environment, to the improvement of the living environment, to the protection of water, air, soils, sites and landscapes, to town planning, or those whose purpose is the control of pollution and nuisance, nuclear safety and radiation protection, deceptive or misleading marketing and advertising practices when the latter practices contain environmental information, and of the enactments for their application."

any tribunal on behalf of these persons . . . if it has been appointed by at least two of the persons concerned.”³⁰

In order to bring suit on behalf of persons injured by environmental damage on the grounds of Article L. 142-2 of the Environmental Code, the certified environmental association must prove three elements: (i) the cause of action; (ii) its governmental certification; and (iii) the existence of a preliminary infringement of the environmental legislative provisions. These three conditions limit the possibility of actions of certified environmental associations under applicable environmental laws. However, in practice, French courts, which scrutinize these conditions on a case-by-case basis, broadly construe them to accept an increasing number of actions on the grounds of Article L. 142-2 of the Environmental Code.³¹

Nevertheless, environmental class actions would put an end to the need to prove the Environmental Code prerequisites, since they would likely be based on civil-law principles requiring proof of: (i) fault or negligence; (ii) damage; and (iii) causation. Class actions would also allow broader groups of people to bring lawsuits to court in order to claim damages for their personal injury; at present, such suits are open only to certified environmental associations.

In the event of industrial accidents, injured persons may be more likely to elect to become members of a class action, since the time, costs, and energy typically required to bring suit are prohibitive for individual complainants. For such individuals, class actions offer the opportunity to share with the other members of the class legal and evidence costs, which are generally very high in the area of the environment, particularly with regard to environmental and technical expertise.

Damage to the Environment

Recent constitutional case law in the area of the environment, as well as the implementation in France of Directive 2004/35/EC of April 21, 2004, on environmental liability with regard to the prevention and remedying of environmental damage, provides a more complete and complex legal scheme to address environmental damage.

On March 1, 2005, France adopted Constitutional Law No. 2005-205, which created the Charter for the Environment (the “Charter”). The Charter, composed of a preamble and 10 articles, proclaims the general principles of environmental law. They include the right to live in a balanced and healthy environment (Article 1),³² the duty for everyone to participate in preserving and enhancing the environment (Article 2),³³ the “polluter pays” principle (Article 4),³⁴ the precautionary principle (Article 5),³⁵ and the principle of public information (Article 7).³⁶ The fact that the Charter is physically “annexed” to the French Constitution but has not been made part of it raised the issue of the Charter’s constitutional value. On June 19, 2008, the French Constitutional Supreme Court (*Conseil constitutionnel*) confirmed the Charter’s constitutional value in its *GMO* decision.³⁷

On October 3, 2008, less than four months after the *GMO* decision, the Administrative Supreme Court (*Conseil d’Etat*) also confirmed the Charter’s constitutional value and the direct applicability to public authorities of Article 7, the public-information principle.³⁸ In particular, on July 19, 2010, the Administrative Supreme Court confirmed the direct and autonomous applicability of the Charter’s principles, putting those principles on an equal footing with all French “fundamental freedoms,” by declaring that “article 5 provisions of the Charter which do not call for any legislative or

30 Pursuant to Article L. 142-3 of the French Environmental Code: “When, in the domains mentioned in Article L. 142-2, several identified persons have suffered individual damages caused by the act of a single person and with a common origin, any association certified under Article L. 141-1 may, if it has been appointed by at least two of the persons concerned, seek redress before any tribunal on behalf of these persons. “The appointment may not be solicited. It must be given in writing by each person concerned.

“Any person who has given his or her agreement for an action to be brought before a criminal court is considered, in this case, as exercising the rights recognized as those of the civil party, in accordance with the *Code de procédure pénale* [French Code for Criminal Procedure]. However, any notifications are addressed to the association.

“The association which brings a legal action in accordance with the provisions of the previous paragraphs may claim damages before the judge of investigation [*Juge d’instruction*] or the tribunal having jurisdiction over the headquarters of the enterprise implicated or, failing this, of the place of the first infringement.”

31 Béatrice Parance, *L’action des associations de protection de l’environnement et des collectivités territoriales dans la responsabilité environnementale*, 6 *REVUE ENVIRONNEMENT* (June 2009) (Fr.).

32 Pursuant to Article 1: “Everyone has the right to live in a balanced environment which shows due respect for health.”

33 Pursuant to Article 2: “Everyone is under a duty to participate in preserving and enhancing the environment.”

34 Pursuant to Article 4: “Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment.”

35 Pursuant to Article 5: “When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage.”

36 Pursuant to Article 7: “Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment.”

37 CC [Constitutional Court], Decision No. 2008-564 DC, June 19, 2008, *Law Relating to Genetically Modified Organisms*.

38 CE Ass., Oct. 3, 2008, *Commune d’Anney*, no. 297931.

regulatory provisions for their implementation, are binding on public authorities and administrative bodies in their respective domains of competence.”³⁹

On August 1, 2008, the French Parliament adopted Law No. 2008/757 on environmental liability, which transposes into the French legal system the EU Environmental Liability Directive, No. 2004/35/EC. This law has introduced a double system of liability: a “no-fault” liability system and a system of liability for wrongful negligence. Decree No. 2009-468, implementing Law No. 2008/757, was adopted on April 23, 2009. This decree has been codified in the French Environmental Code in Articles R. 161-1 to R. 163-1. Pursuant to Article R. 162-3 of the Environmental Code, certified associations for the protection of the environment mentioned in Article L. 142-1 of the Code may inform the appropriate authorities of the facts that establish the existence of damage or a threat of damage to the environment. Pursuant to the “polluter pays” principle, the corresponding liability applies to the operator, provided that: (i) the operator can be identified; (ii) the damage is concrete and quantifiable; and (iii) a causal link can be established between the damage and the operator’s activity.

Both the Charter and the law of August 1, 2008, illustrate the ongoing modification and proliferation of environmental regulations and principles in France. They increase the environmental liabilities of operators and extend the intervention and legal actions of environmental associations. The current French regulations and principles offer fertile ground for the development of group actions today and of class actions tomorrow.

39 CE, July 19, 2010, *Assoc. du quartier les Hauts de Choiseul*, no. 328687.

PRODUCT LIABILITY LAW IN GERMANY

Germany has implemented both Directive 85/374/EEC of July 25, 1985, and Directive 2001/95/EC of December 3, 2001. Thus, German legislation has the same basis as other European countries regarding product liability. Germany implemented Product Liability Directive 85/374/EEC (the “PLD” or the “Directive”) by passing a special law, the *Produkthaftungsgesetz* (the “ProdHaftG”), which came into force on January 1, 1990. European law was therefore not integrated into the existing German Civil Code.

The ProdHaftG mirrors the PLD very closely, copying it verbatim in some parts, adding or shortening passages in others. The ProdHaftG governs German law, creating rights and duties and making direct recourse to the actual PLD obsolete. The ProdHaftG establishes the principle of strict liability for manufacturers for damage caused by a defective product, with no proof of culpability needed.

Since the ProdHaftG is German law, its interpretation is primarily the duty of German courts. However, where terms contained in the PLD are used, their interpretation must be consistent with the Directive. German courts draw on the reasoning for the PLD as well as drafts of the PLD, and they can also refer questions to the European Court of Justice (the “ECJ”) for clarification. In applying the ProdHaftG, German courts must observe ECJ rulings on the PLD.

THE GPSG

German law features the Appliances and Products Safety Act (the “GPSG”), which came into force on May 1, 2004.¹ It encompasses a number of European product and safety-related directives,² but it serves mainly to implement into national law the General Product Safety Directive, 2001/95/EC (the “GPSD”). Again, a special law was created, rather than incorporating the GPSD into existing legislation, and terms taken from the GPSD must be interpreted in keeping with the GPSD and the ECJ’s case law.

The GPSG has a preventive aim and sets out the standards to which a product or appliance must conform. It also sets out manufacturers’ duties in cases of defective and dangerous products. Because the GPSG is public/administrative law, rather than civil law, the state watches over manufacturers’ adherence to it. It does not confer civil claims on individuals and aims to prevent product safety incidents.

SCOPE OF APPLICATION

Altogether 24 sections specify in detail safety standards, handling requirements, and administrative rules. According to Section 1, the GPSG applies to “the circulation and

the display of products in the course of an independent commercial activity.” “Putting into circulation” means providing a product to another person independently and as part of a commercial activity. “Displaying” means advertising and promoting a product for sale.

According to Section 4 of the GPSG, a product may be put into circulation only if it will not endanger any person’s health and safety when it is used as intended or foreseeably misused. The GPSG sets down extensive duties to inform and identify in Section 5. Every product must identify its manufacturer, and consumers must be sufficiently instructed of all possible dangers to safety that may result from the use or foreseeable misuse of the product. The manufacturer and the importer must inform the designated authority if they are aware that their product may endanger the health and safety of a person and must inform the authority about any remediating measures that have been taken.

According to Section 8, paragraph 2, GPSG, the competent market-inspection authorities must ensure effective surveillance over the introduction of new products into the market as well as products already on the market. According to Section 8, paragraph 3, GPSG, the highest competent regional government authorities must

¹ Replacing the previously existing two laws, both based on Directive 2001/95/EC.

² Such as 2006/95/EC, 88/378/EWG, 87/404/EWG, 90/396/EWG, 89/686/EWG, 98/37/EC, 94/25/EWG, 94/9/EC, 95/16/EC, 75/324/EWG, and 97/23/EC.

coordinate this surveillance. To avert significant dangers, these authorities must develop a surveillance plan and prepare appropriate federal measures. Alongside general product safety, the GPSG allows for special directives to detail how some products (machines, toys, sporting goods, electrical devices) can be put into circulation.

Ratione Materiae

The GPSG applies to:

- Products, technical appliances, and consumer products;
- Technical appliances: Ready-to-use appliances, which are intended for use only at work;
- Consumer products: Products intended for consumers; products that consumers can reasonably be expected to use, even if not intended for their use; or products that are given to consumers as part of a service.

A product is “ready to use” when it can be used as intended. Used products, which do not fall under the GPSG, consist of vintage products, along with products that must be repaired or assembled before use (a fact of which the user has been informed).

Ratione Personae

The GPSG applies principally to manufacturers, sellers, and importers:

- A “manufacturer” is anyone producing a product, reprocessing it, or substantially altering it before putting it into circulation or representing itself as the manufacturer.
- A “seller” is someone who commercially puts products into circulation without being the manufacturer, manufacturer’s agent, or importer.
- An “importer” is anyone who imports a product into the European Economic Area from a nonmember country or commissions the import.

SANCTIONS

Because the GPSG is public/administrative law, it does not give rise to civil claims. Its main function is preventive, giving authorities the power to monitor product safety and take appropriate actions according to Section 8 GPSG. Those actions include, but are not limited to:

- Warning the public;
- Ordering warnings to be attached to products and sales points;
- Ordering the withdrawal of a product from circulation; and
- Prohibiting the circulation of a product.

The GPSG provides sanctions for manufacturers who do not adhere to their duties according to the GPSG or any measures undertaken by the authorities according to Section 8 GPSG. Section 19 sets financial penalties of up to €3,000 for minor violations and up to €30,000 for major or repeated ones. According to Section 20, an intentional or negligent breach of the manufacturer’s duties set out in the GPSG leading to injury to a consumer can even result in a prison sentence of up to one year for the manufacturer.

PRODUCT RECALLS AND GOVERNMENT ADMINISTRATIVE INVESTIGATIONS OF PRODUCT DEFECTS

The GPSG gives the relevant authorities the power to monitor products on the market, to require manufacturers’ adherence to the GPSG’s standards, and to remedy any violation. The most important remedies are warning and product recall.

RAPEX is the EU rapid alert system for all dangerous consumer products, with the exception of food, pharmaceuticals, and medical devices. The system, which issues not just warnings but also recalls, works across Europe. However, a manufacturer must also alert the local and national authorities should a significant product defect occur.

European Level

RAPEX allows for the rapid exchange of information between the Commission and the Member States, via central contact points,³ concerning measures taken to prevent or restrict the marketing or use of products posing a serious risk to consumer health and safety. RAPEX covers both measures ordered by national authorities and measures taken voluntarily by producers and distributors. The RAPEX National Contact Points must always be informed, according to Section 5, paragraph 2, GPSG, as well as the local authorities. Every Friday, the Commission publishes a weekly overview of the dangerous products reported by the national authorities (the RAPEX notifications). This weekly overview provides information on the product, the possible danger, and the measures taken by the reporting country.

National Level

The German ministry responsible for consumer policy, consumer protection, and consumer information is the Federal Ministry of Food, Agriculture and Consumer Protection. It is responsible for:

- Consumer health protection as well as protection from deception with regard to food, animal feed, cosmetics, and other commodities, including the pertinent labeling laws;

3 The National Contact Points for Germany can be found at <http://www.bmelv.de> (web site last visited August 2, 2012).

- Food and nutrition policies, especially dietary education; and
- The protection of consumers' economic interests, including issues regarding consumer information.

In general, injured consumers are responsible for asserting their own private claims under civil law. Class actions are rare. Under exceptional circumstances, consumers' claims can be assigned to a consumer protection organization, which can then file the claims for the consumers. Public authorities are concerned only with enforcing health and safety laws and pursuing any criminal action warranted against manufacturers.

Product Recall

If warning consumers of product risk will not suffice to protect their health and safety, then the product must be withdrawn from the market. A manufacturer is obliged to recall a product if it poses a serious danger to life, body, or health. Products which are intended for home or everyday use or which are mass-produced will pose an even bigger threat and increase the duty to recall should the circumstances arise. However, all circumstances must be examined on a case-by-case basis. According to Section 8 GPSG, the competent local authorities have the power to decide appropriate measures. They will also work closely with the manufacturer when a recall takes place.

CIVIL LIABILITY

STRICT LIABILITY ACCORDING TO THE PRODHFTG

Section 1 of the ProdHaftG sets forth three core requirements to prove strict liability:

- Product defect;
- Injury; and
- Causal link.

Section 2 ProdHaftG defines “product,” and Section 1, paragraph 2, summarizes exceptions from that strict liability, which mirror the PLD exactly. In Section 1, paragraph 3, these exceptions are extended for the benefit of manufacturers of parts or producers of raw materials. In effect, the manufacturers of component parts, finished products, or raw materials are all equally liable according to the ProdHaftG.

If liability can be established according to Section 1 ProdHaftG, it is extended to quasi-manufacturers, European Economic Region importers, and retailers according to Section 4 ProdHaftG. According to Section 14, claims under the ProdHaftG cannot be waived by contractual agreement. The statute of limitations is three years (Section 12 ProdHaftG), beginning with the claimant's knowledge of the product defect, the injury, and the manufacturer, but

ending, at the latest, 10 years after the product was put into circulation.

Design Defect

The manufacturer must design the product to meet state-of-the-art safety standards in all the ways in which it is intended to be used. If a product fails to meet this standard, the product has a design defect (*Konstruktionsfehler*, which is literally translated as “construction defect”). Product safety is measured against the expectations of those consumers for whom the product is intended. In practice, this means looking at the target consumers, assessing their needs and how they might reasonably use the product, and making it state-of-the-art in safety for those uses.

An obvious, known risk inherent in the use of a product, such as a weapon, does not constitute a design defect. The existence of dangers and risks that are generally or specifically known to consumers and thus accepted does not make the product flawed. For example, equipment for extreme sports, sports cars, convertibles, and stimulants such as alcohol and cigarettes are not defective. Likewise, dangers resulting from misuse or unforeseeable uses do not constitute a design defect.

A manufacturer is not liable for design defects that were unavoidable despite adherence to the highest standard of science and technology available at the time of product circulation.

Manufacturing Defect

If a product does not conform to the standards of safety set by its manufacturer for that type of product, it has a manufacturing defect. A manufacturing defect is established by comparing the condition of the defective product with a reference product that conforms to the manufacturer's blueprint.

If the comparison shows a deviation concerning a safety-relevant feature, and that feature caused the violation of a legally protected interest (i.e., a “right,” whether health, property, or other), the manufacturing defect is the basis for liability according to Section 1 ProdHaftG. The manufacturer is liable for a tiny percentage of defective products that even state-of-the-art manufacturing processes cannot eliminate—“rogue products” (*Ausreisser*). Just as state-of-the-art production processes are not a valid defense, so state-of-the-art safety technology (which excludes liability for design defects) is not a valid excuse for manufacturing defects.

Instruction Defect (*Instruktionsfehler*)

Manufacturers are obliged to issue products with instructions for proper use, including warnings of dangers from foreseeable misuse and dangers inherent in the

product. This civil liability duty to warn differs from the manufacturer's duty under the GPSG to warn government authorities and the public of an actual product defect when it becomes apparent. The GPSG itself does not form the basis of civil claims.

The instruction defect encompasses the duty not just to warn of possible dangers, but also to provide, in the appropriate language, the right instructions as to the proper use of the product. Instructions, like warnings, must be readable, understandable, and appropriate. That said, failure to warn is nowhere near as prevalent an issue as it is in the United States. German case law places more emphasis on the consumer's responsibility to act reasonably. It has therefore limited manufacturers' liability to cases where the manufacturer has not informed the user of the way in which the product is to be used and the dangers in connection with that use, or where the manufacturer has not informed the user sufficiently. A defect can be established by an absence of instructions or by flaws in the content of the instructions. The instructions must contain correct directions as to how the product can and should be used. Manufacturers must warn not only of any adverse effects of proper use, but also of the dangers of foreseeable misuse.

A manufacturer cannot escape liability for design defects simply by attaching certain instructions or warnings to a product. The manufacturer must design a safe product and then warn of any risks that the safely designed product still presents. However, a manufacturer is not liable for every injury resulting from obvious dangers or from unforeseeable misuse. For example, while certain cleaning products normally contain appropriate warnings, such as to keep the product away from children, it is not necessary to attach instructions to a knife warning that it is sharp. Likewise, while an electrical appliance such as a microwave will require instructions for use, including directions as to what materials cannot be placed inside, a takeout coffee container does not have to warn that it contains hot liquid. Some responsibility is put on the consumer rather than the manufacturer.

Burden of Proof

Section 1, paragraph 4, ProdHaftG allocates to the injured party the burden of proving liability according to Section 1, paragraph 1 (product defect, injury, causation). The manufacturers must prove exceptions from liability, according to Section 1, paragraphs 2 and 3.

Damages

According to Section 249 of the German Civil Code and Section 8 ProdHaftG, compensatory damages are awarded to the extent necessary to restore the injured person as if the injury had never happened. Damages for nonmaterial

injury such as mental distress can be claimed according to Section 8 ProdHaftG and Section 253 German Civil Code.

Section 10 of the Product Liability Act places a cap of €85 million on damages resulting from a single product or several products with the same defect, even if more than one person is injured. The concept of punitive damages is alien to German law.

Whenever two or more persons are found liable for the same damage pursuant to the provisions set forth in the ProdHaftG, they will have joint and several liability. A claimant can receive damages only once for the same injury, but each culpable defendant is fully liable to the injured party. There is the possibility of recourse between the culpable parties.

Quasi-Manufacturers, Importers, and Suppliers

According to Section 4, paragraph 1, ProdHaftG, any person who attaches his or her name, trademark, or other sign to a product, its packaging, or its attached instructions will be treated as a manufacturer ("quasi-manufacturer"). Similarly, anyone importing a product into the EEC area for commercial purposes of sale, hire, leasing, or any form of distribution in the course of his or her business is liable as a manufacturer, according to Section 4, paragraph 2, ProdHaftG.

A product supplier can be liable according to Section 4, paragraph 3, if the supplier does not provide, upon demand and within a month, the identity of the producer or the person who supplied it with the product.

LIABILITY FOR NEGLIGENCE ACCORDING TO THE GERMAN CIVIL CODE

Section 823 German Civil Code makes manufacturers liable for their negligence. Section 823 exists alongside the strict liability regime of the ProdHaftG, but it has slightly different requirements. The claimant must prove that:

- The injuring act was the introduction of the product into circulation;
- The product was defective;
- The manufacturer is culpable;
- The negligence caused harm to a person's life, health, or property (other than the defective product itself or its distinctly separate parts).

Defect

The product may be defective because of its design, manufacturing, or warning and instructions. However, the main issue in Section 823 German Civil Code is the question of culpable negligence.

Culpable Negligence

The claimant must prove that the manufacturer was culpably negligent. A manufacturer was negligent if it violated one of the duties established by case law.

- **Organizational duty of care**

The manufacturer must ensure that no product with any defect is put into circulation; consequently, production and quality control must avoid or detect any defects beforehand. However, the manufacturer is not liable for defective products that even state-of-the-art manufacturing processes cannot eliminate, such as “rogue products,” that tiny percentage of output having some manufacturing defect. Under strict liability, a manufacturer is liable for all manufacturing defects, but under Section 823 German Civil Code, it is not liable for such rogue products, because it met the organizational duty of care.

Similarly, case law has established that manufacturers are generally not culpable for design defects. While manufacturers must take into account any information regarding new or risky products, a manufacturer is generally not culpably negligent if a product turns out to have a design defect.

- **Duty to instruct**

The duty to instruct mirrors the strict liability instruction defect. A proven violation of the duty to instruct is a culpably negligent act, making the manufacturer liable.

- **Product-monitoring duty**

A manufacturer is obliged to monitor the product in the market so as to be alert to any emerging defects in the product itself or the products in or with which it is used (even if a different company makes them). Manufacturers must remain vigilant and watch for reports of injury inside and outside the German market, or they will be deemed to have been culpably negligent.

- **Duty to avert danger**

If dangers are detected after a product has been circulated, the manufacturer must act appropriately. Appropriate warnings of the actual danger must be given to the authorities and the public. According to Section 5, paragraph 2, GPSG, the competent authorities must be informed. Frequently, visible displays of warnings in appropriate retail locations are posted. The exact measures that must be taken and the timing of such measures depend on the likelihood and type of damage that might occur (risk to life, health, property).

If warnings are insufficient to address the risk, the product must be recalled and withdrawn from the market. A

manufacturer is obliged to recall a product when a defect within it poses a serious danger to the life, body, or health of many consumers. This obligation increases where the deficient product is a mass-produced item intended for home use. However, it must be determined on a case-by-case basis whether, in view of the known danger, a recall is in order or whether less drastic measures would suffice.

Burden of Proof

Case law has allocated the burden of proof, which largely favors the claimant. In general, a claimant has the burden of proving product defect, injury, and the causal link between the two. However, if the product has not been modified after being put into circulation, it is assumed that the defect resulted from the manufacturer's actions. The burden of proof is then often reversed, because it is deemed unreasonable to make the claimant prove some facts in the manufacturer's sphere to which the claimant has no access.

Culpable negligence is assumed, and the manufacturer must prove that it met its duties. A manufacturer must prove that its production process, as well as the actual quality control, was state-of-the-art and that no negligence took place. If an instruction defect is claimed, the manufacturer must also prove that all duties were observed and that the danger was unforeseeable.

Damages

Again, according to Section 249 German Civil Code, the injured party must be compensated as if the injuring act had never taken place. Any injury to life, health, body, or property can be claimed. Any monetary damages resulting from the injury can be claimed, such as hospital treatment costs, loss of earnings or profits from employment due to the injury, and loss of property. Damages for injury that is not monetary, such as mental suffering or distress, cannot be claimed. Those nonmonetary damages can be claimed only under Section 8 ProdHaftG and within the statutory limitations of Section 253 German Civil Code. There is no cap on damages awarded according to Section 823 German Civil Code.

Manufacturers, Quasi-Manufacturers, Importers, and Distributors

Section 823 German Civil Code applies to all persons or entities owing a duty to a product user. Generally, the actual manufacturer of the part or the end product owes a duty not to make or sell a defective product. A component manufacturer or raw material supplier may be equally liable if it is culpably negligent and its negligence caused harm to a person or property. Suppliers are liable for the parts they supply. They can also be liable for construction defects in the end product if their conduct warrants liability. In exceptional circumstances, executives can be directly liable, as well as persons directly responsible for production.

Importers and distributors are not manufacturers and are therefore not liable in the same way. However, they must observe the duty to instruct where foreign manufacturers are concerned, and they must observe to some extent the duty to monitor products for potential dangers.

BREACH OF WARRANTY: SECTION 433 ET SEQ. GERMAN CIVIL CODE

If the manufacturer does not have a contractual relationship with the consumer, it has no liability for breach of warranty according to Section 437 German Civil Code. Liability for breach of warranty under Section 437 arises from the sales contract between seller and consumer. However, under Section 437, a manufacturer may have recourse against a culpable supplier.

A consumer suing for breach of warranty rights has several remedies under Section 437 German Civil Code. He or she can exchange or demand repairs for the defective product. Failing that, the consumer can:

- Demand a reduction in the purchase price;
- Rescind the contract; or
- Demand damages.

Damages can be claimed only if the seller is culpable, meaning that the seller was aware of the defect and knowingly sold a defective product. When a manufacturer is also the seller, the manufacturer's negligence will make it culpable and thus liable for damages.

There are several ways of ascertaining whether a product as sold is defective in breach of a warranty:

Express Warranty, or "Subjective Defect"

When the parties have agreed on the condition of the product to be sold, either in writing or orally, they have determined the product's necessary quality and characteristics. Any adverse deviation from this agreement is a "subjective defect," which fails under the warranty.

Implied Warranty, or "Objective Defect"

When parties have contractually agreed on the product's intended use, then the product must be fit for this use. If the parties have made no express agreement on the product's intended use, then the implied purpose is the standard. For example, a car must be fit to drive. If the product is unfit for its purpose, an "objective defect" will fail under the warranty.

Warranty Derived From Advertising

Any public claim made by the seller, the manufacturer, or a person acting on behalf of them constitutes an implied

warranty, especially those made in advertising or on product labeling. No warranty is given:

- If the seller did not know of these claims and was under no obligation to know of them;
- If the claims were withdrawn and rectified at the time of sale; or
- If the claims could not influence the consumer's decision to buy.

Damages

Damages, if available, can be claimed for any material (monetary) damages as a result of the injury according to Section 249 German Civil Code. These damages include hospital costs if the consumer is injured, loss due to damage of other property, and the money spent on the defective product itself, among other things. Again, nonmonetary injury, such as mental stress, cannot be claimed.

Statute of Limitations

The statute of limitations is two years after the product has been delivered, extending to five years for materials used in buildings, according to Section 438 German Civil Code.

Fraud and Misrepresentation

A claim for fraud and misrepresentation arises only from a contractual relationship. The injured party may rescind the contract, but this does not give rise to higher damages. However, the statute of limitations for claims according to Section 438 German Civil Code is extended to three years. See Section 438, paragraph 3, German Civil Code.

BRIEF DESCRIPTION OF CIVIL PROCEEDINGS

Civil proceedings are initiated by filing a statement of claims with the German Civil Court for service on the defendant. A foreign claimant (an individual or company) is obliged to pay a security deposit upon filing a complaint if the defendant puts forward a motion to that end (Section 110 of the German Civil Procedure Code). The defendant responds to the statement of claims in writing.

Before an oral hearing takes place, each party usually submits two or three briefs to the court. Proceedings typically take between nine months and a year, from the filing of the claim to a judgment in the first instance, depending, of course, on the court's workload and the complexity of the case. Frequently, experts are appointed to analyze the product, the defect, and the likely cause.

In any proceeding with a value of €5,000 or more, attorneys must represent the parties. Following the statement of claims, the parties will exchange written submissions

in which they present their facts of the case, supported by evidence and arguments.⁴ Evidence may be offered through witnesses, inspection by the court, documents, and expert witnesses. Witnesses are offered by name and address in the written statements, but written witness statements are generally not admissible, as witnesses shall be heard in person during the oral hearing.

Pretrial discovery is a concept alien to German law and is generally not available. Each party presents its own evidence to support its claims. However, at the discretion of the court, individual measures, such as applying for disclosure of one or more individually named and described documents in the other party's possession, are sometimes allowed.⁵

Once the parties have exchanged their written pleadings, an oral hearing is scheduled and takes place before the court. Unlike U.S. hearings, German oral hearings are led by the judge (or the presiding judge in those cases where a panel of three judges is allocated to the case, Section 136 German Civil Procedure Code); the judge guides the parties through the proceedings, asks questions, and provides instructions. The oral hearing can also be an opportunity for settlement negotiations led by the judge. The court will issue its decision within weeks or months of the hearing.

Once the judgment has been handed down, the parties have a month from the day on which the written judgment was served to appeal the decision (Section 517 German Civil Procedure Code). The majority of judgments are provisionally enforceable. The enforcing party may pay a deposit and then (provisionally) enforce the first-instance judgment while the appeal is pending (Section 704 *et seq.* German Civil Procedure Code).

CRIMINAL LIABILITY OF MANUFACTURERS AND SUPPLIERS

THE GPSG

Anyone who fails to inform the competent authorities comprehensively and in a timely manner of a product that does not conform to the safety specifications of the GPSG commits a misdemeanor. See Sections 19 and 20 GPSG. Anyone who continues to circulate or introduce into circulation products that do not conform to GPSG standards despite knowing of the nonconformity, as well

as anyone interfering or not complying with measures undertaken by the authorities to protect product safety, commits a crime.

Criminal liability according to the GPSG does not require an actual injury. Criminal penalties apply as soon as a criminal act endangers life, body, health, or property of significant value.

Section 20 prescribes imprisonment of up to a year or a penalty for anyone who intentionally and continually disregards the competent authority's orders, including an order to recall a nonconforming product.

THE GERMAN CRIMINAL CODE

The German Criminal Code applies when a person's life, body, or health is harmed. Moreover, if a manufacturer or distributor has learned of a danger inherent in a previously undetected product defect and fails to conduct a product recall, criminal liability for any injuries may result.

The Federal Court of Germany established the principles of criminal liability for manufacturers of faulty products in the "leather spray" case.⁶ This decision described the general grounds for criminal liability:

- If the members of the board of a (limited liability) company⁷ unanimously decide not to conduct a necessary recall of a product, they will all be criminally liable as abettors for the harm incurred because of the product.
- Any executive who, despite having the necessary authority, fails to make a necessary recall decision is held to have caused the failure to recall. There is criminal liability even if the executive would not have prevailed due to other executives' opposition to a recall.
- If the one-time failure to act leads to several cases of injury, only one criminal action will be brought.
- The causal link between the product defect and the consumer's injury is deemed to be established even if the substance that caused the injury cannot be ascertained despite the elimination of other causes of injury.
- A manufacturer or distributor is obliged to prevent unexpected injury from the intended use of the product.
- Manufacturers and distributors are obliged to recall dangerous products that are in circulation.
- If several executives of one company have to decide whether to recall a product, each one is obliged to make all reasonable efforts to attain a decision for a recall.

4 Section 130 German Civil Procedure Code sets out the requirements for the submissions, which must include: (i) the parties concerned; (ii) the facts of the case; (iii) the evidence; and (iv) the legal arguments.

5 Section 142 German Civil Procedure Code states that the court can order a party to the litigation or a third party to disclose a document to which a party has made reference. The document must be known and sufficiently described by the party; e.g., the claimant refers to a contract of sale between the defendant and a third party that is known to exist but is in the defendant's sole possession.

6 06.07.1990 – 2 StR 549/89.

7 In this case, a *Gesellschaft mit beschränkter Haftung*, but later extended to any company.

THEORIES AND STANDARDS

Before the Federal Court's "leather spray" decision, legal opinion was split as to whether executives were criminally liable for injuries. Two core questions arose: first, which act or omission to penalize, and second, how to establish a causal link. In the "leather spray" case, the liability of the manufacturer's executives was premised on an omission rather than a criminal act.

First, under German law, an omission can be penalized only if and when the omission runs contrary to a criminally relevant legal obligation to act. In the "leather spray" decision, the Federal Court imposed a "warrantor's position" (*Garantenstellung*) on the manufacturer and distributor. Having put a defective product into circulation, the manufacturer and distributor have committed, presumably unwittingly, a wrongful act. This wrongful act (*Ingerenz*) carries with it the danger of injury, for which the perpetrator becomes a "warrantor," with a duty to undertake all reasonable measures to prevent any injury. The manufacturer and distributor become liable for all omissions leading to injury.

Second, the causal link would be indirect, particularly in cases where more than one executive's vote is decisive. Formerly, when majority decisions were followed, an opposing executive could not be held responsible if it could not be proved that his or her vote was decisive. The "leather spray" decision put an end to this argument, making all persons with a vote in the matter responsible for their acts or omissions. It even extended responsibility, preventing any executive from hiding behind the other executives and obliging every board member to vote according to his or her duty.

BRIEF DESCRIPTION OF CRIMINAL PROCEEDINGS

Criminal proceedings require a public prosecutor to initiate a public action and a court to allow it (Section 151 of the German Criminal Procedure Code). Since a criminal proceeding is an action of the state, seeking punishment for a violation of law, a private individual may file a criminal complaint and request the initiation of proceedings (*Strafanzeige/Strafantrag*, Section 158 German Criminal Procedure Code). However, the initiation of proceedings is the sole prerogative of the state, since a crime requires public prosecution.

A victim may initiate a judicial review procedure if his or her request for action is not granted (*Klageerzwingungsverfahren*, Section 172 German Criminal Procedure Code) and may join criminal proceedings as a plaintiff

(*Nebenkläger*, Section 395 *et seq.* German Criminal Procedure Code). A private individual can initiate a criminal proceeding (*Privatklage*) only with regard to certain misdemeanors that are identified in Section 374 German Criminal Procedure Code.

Usually, the public prosecutor of its own accord or following a criminal complaint by an individual will initiate an investigation of the matter (*Ermittlungsverfahren*, Section 160 German Criminal Procedure Code). The police, under the guidance of the public prosecutor, will use their powers to investigate the facts, secure evidence and witnesses, and ascertain the chain of events (Section 163 German Criminal Procedure Code). When the investigation has concluded, the public prosecutor will put together the case and submit it to the court. The court then decides whether to initiate the "main proceedings"—the trial.

Germany does not have a jury system. Its criminal court system has tiers according to the gravity of the crime:

- Offenses with a minimum sentence of less than one year's imprisonment or fines are handled by the Magistrate's Court, where either a single judge or a panel comprising one presiding judge and two lay judges will hear the case. Two private individuals sit with the professional judge.
- Offenses with a minimum sentence of one year's imprisonment or more are heard in the regional court, where, depending on the nature of the case, either a panel of one presiding judge and two lay judges or a panel of three judges and two lay judges will hear the case.

Criminal courts have public oral hearings, meaning that in principle, anyone, including journalists, can follow the proceedings.⁸ Again, the oral hearing is led by the presiding judge, who guides the proceedings and interviews witnesses before the prosecution or defense. Witnesses are heard in person, and written statements are not admissible. Save for very limited exceptions, the defendant must be present in person.

Depending on the case's complexity, the court will render a decision either immediately after the oral hearing or at a later date. Criminal courts may order fines, imprisonment, or any other sanction as set forth in the German Criminal Code, but they cannot award damages to the victim. The parties can appeal the decision within a week of the day on which the judgment is handed down (Section 314 German Criminal Procedure Code), and the appeal suspends enforcement of the order.

8 Exceptions are granted only for the protection of the dignity of the victims or witnesses, and then only during their testimony in intimate matters.

PRACTICAL ADVICE

THE ATTORNEY-CLIENT PRIVILEGE

Under German law, but for a criminal law exception, attorney-client communications are not generally privileged. However, pursuant to Section 2 of the German Rules of Professional Ethics (*Berufsordnung*), a lawyer has the right and the duty to keep secret all information obtained while acting as an attorney.

Pursuant to Section 383, paragraph 1, No. 6, German Civil Procedure Code, if called as a witness in civil litigation, a lawyer (an admitted *Rechtsanwalt*) has the right to refuse to testify about all facts obtained while representing a client. Also, pursuant to Section 201, paragraph 1, No. 3, of the German Criminal Code, a lawyer who discloses secret facts obtained in his or her role as the lawyer can be criminally liable. In criminal proceedings, the lawyer can refuse to testify pursuant to Section 53, paragraph 1, No. 3, German Criminal Procedure Code.

The client, however, does not have corresponding rights. Accordingly, the client will have to testify about his or her conversations with the lawyer.

German civil procedure law does not recognize pretrial discovery and document productions. Accordingly, the issue of “privileged documents” will not arise. If a document would have to be produced, however, the client could not raise privilege as a defense.

For in-house counsel, the situation is more complicated. According to the prevailing opinion in the legal literature and corresponding case law, in-house counsel have the same “privileges” as outside counsel only if: (i) they are admitted as *Rechtsanwälte*; (ii) they provide attorney services to their “clients” (their employers); and (iii) their independence as lawyers is warranted. Only then can they refuse to testify regarding their employers’ affairs. This definition is difficult to apply. Some legal departments are structured like an in-house law firm to maintain privilege, with separate rooms that can be accessed only by appointment, using special key cards.

Under criminal procedure law, any oral and written communication with the criminal defense lawyer (*Strafverteidiger*) made in connection with the defense is privileged and generally cannot be monitored or seized. This rule applies to criminal proceedings only. This privilege can also apply to in-house counsel, but only if the relevant documents are in their sole possession and if the documents relate to facts about which in-house counsel have the right to refuse to testify (just as any other outside lawyer could).

Should a German prosecutor raid a company, the prosecutor will seize all documents irrespective of any U.S. privileges that would protect the communication otherwise. Once these documents become part of a criminal file, at least in theory, any third party that can show a legitimate interest has the right to review the file.

INSURANCE

There is no general obligation for German companies to have general company liability insurance or product liability insurance, which covers personal injury and property damages. However, many companies maintain such insurance policies, along with additional insurance plans covering claims for purely monetary losses and, depending on the policy, other costs that may arise.

PRODUCT LIABILITY LAW IN ITALY

IMPLEMENTING THE EUROPEAN PERSPECTIVE

The European Union has adopted directives of broad and general scope to address product liability and product safety:

- Directive 85/374/EEC (creation of no-fault, strict liability regime);
- Directive 1999/34/EC (strict liability for defective and unsafe products);
- Directive 92/59/EEC (general safety requirement that “no producer shall place a product on the market unless the product is a safe product”); and
- Directive 2001/95/EC (general product safety; introduction of the obligation upon manufacturers to notify the relevant government authorities if they have information that their product poses a risk to consumers, which may lead to a mandatory product recall).

Italy has implemented Directive 85/374/EEC (the “Product Liability Directive”) by Law No. 224 of May 24, 1988; Directive 1999/34/EC by Legislative Decree No. 25 of February 2, 2001; and Directive 92/59/EEC by Legislative Decree No. 111 of March 17, 1995 (both amended by Legislative Decree No. 206/2005—the “Consumer’s Code”); and Directive 2001/95/EC by Legislative Decree No. 172 of May 21, 2004.

CONSUMER PROTECTION AND PRODUCT LIABILITY LEGISLATION IN ITALY

ARTICLE 2043 OF THE ITALIAN CIVIL CODE

In Italy, product liability was traditionally based on the general torts provision set forth in Article 2043 of the Italian Civil Code (“ICC”). This article provides that any person who by willful or negligent conduct causes unfair detriment to another party must compensate that injured party for any resulting damage (the “*neminem laedere*” principle).

Article 2043 ICC allows consumers to sue manufacturers for damage caused by defective products. Negligence is typically an element necessary to establish liability.

In general, under Article 2043 ICC, the plaintiff must prove:

- The defect of the product;
- The damage suffered;
- That the product defect caused the damage; and
- The defendant’s negligence or fault.

In accordance with this provision, moral damage¹ can be compensated, and no one is exempt from liability.

It can be difficult for a consumer to provide evidence of fault in connection with products that have complex manufacturing processes. Consequently, some court decisions and legal scholars have developed the theory that the defective nature of a product alone is sufficient to prove negligence in the manufacturing process. In their view, the manufacturer’s fault can be proved by the mere existence of the defect generating the damage.

Claims brought under Article 2043 ICC are subject to the general five-year tort liability limitation period, starting from the time when the claimant could exercise his or her rights. The time limit is extended if the tort is connected to the perpetration of a crime. Moreover, when the damage is of a continuing nature or is aggravated over time, the limitation period starts from the aggravation that gave standing to sue.

Article 2043 ICC coexists with the strict liability system governed by Legislative Decree No. 224/1998, which implements the EU’s Product Liability Directive (85/374/EC) and which has been consolidated by Legislative Decree No. 206/2005—the Consumer’s Code.

LEGISLATIVE DECREE NO. 206/2005—THE “CONSUMER’S CODE”

The Consumer’s Code harmonizes and consolidates the laws of purchase and consumption in order to ensure a high level of protection to consumers and users in accordance with the principles of the European Union’s legislation. The Consumer’s Code has been in force since October 23, 2005.

¹ As provided by Italian law, “moral damage” (*danno morale*) is commonly used to designate and describe every damage inflicted upon interests that are not considered patrimonial, such as mental anguish, humiliation, and emotional distress.

The Consumer's Code, in conjunction with general law (such as the ICC), provides rules designed to protect consumers, such as those on transparency in banking and consumer credit agreements; regulation of contracts and liability of financial brokers; insurance contracts; and regulation of the retail trade.

With respect to product liability, the Consumer's Code:

1. Recognizes "fundamental" rights of users and consumers (such as health, safety, information, correctness in advertising, consumer awareness and education, and propriety and fairness in contracts);
2. Regulates some aspects of consumer contracts, including warranties applicable to the sale of consumer goods and post-sale duties;
3. Regulates product safety and product liability; and
4. Addresses consumer access to justice and the form of collective actions.

The Consumer's Code introduces a strict product liability regime. It defines "product," "defective product," "manufacturer," "supplier," and the scope of manufacturers' and suppliers' liability. The injured party must prove the damage, the defect in the product, and the related causation, but not the manufacturer's fault.

Article 117 of the Consumer's Code provides that a product is defective when it does not provide the safety that one can reasonably expect, taking all circumstances into account, including:

1. The way in which the product was distributed; its packaging, evident features, and instructions; and the warnings supplied;
2. The product's reasonably expected use and life cycle; and
3. The period during which the product was distributed.

Furthermore, according to this provision, a product cannot be considered defective simply because a safer one was marketed later. A product is defective if it does not offer the safety normally offered by other samples from the same range.

To summarize, in product liability claims under the Consumer's Code, the injured party must provide evidence of:

- The product defect under the Consumer's Code definition;
- The damage incurred (based upon general tort rules);

- The causal relationship between defect and damage (on the basis of the general principles of causation in tort laws, proof of causation is often achieved through presumptions); but
- Unlike under Article 2043 ICC, no evidence of fault is required. Since the plaintiff has no burden of proving fault, the defendant must provide evidence excluding liability (e.g., proving the plaintiff used the product inappropriately).

Other laws do not affect the product liability legislation directly but involve consumer protection and incentives to increase competition. See Law No. 248 of August 4, 2006, and Law No. 40 of April 2, 2007 (confirming Legislative Decree No. 7 of January 31, 2007).

THE DOUBLE-TRACK PROTECTION: THE EUROPEAN COURT OF JUSTICE AND ITALIAN SUPREME COURT DECISIONS

Litigation by injured plaintiffs against product manufacturers is increasing. Because the Consumer's Code allows a consumer to seek (alternatively or cumulatively) other forms of protection provided by law, a product liability plaintiff will likely sue under both the Consumer's Code and Article 2043 ICC.

Article 13 of the EU Product Liability Directive permits cumulative theories of liability. Article 13 provides: "This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified." The European Court of Justice has clarified Article 13 of the Product Liability Directive:

The reference in article 13 to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the directive . . . does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or warranty in respect of latent defects.²

The Italian Supreme Court (*Corte di Cassazione*) has confirmed the double-track protection system, based on both the EU's product liability regime and domestic rules on tortious liabilities.³ In a case concerning damage caused by a defective car, the Supreme Court ruled that product liability claims can be grounded in the tort rules based on fault or negligence set out in Article 2043 ICC, in addition

² European Court of Justice Decision No. C-285/08.

³ Italian Supreme Court Decision No. 13432/2010.

to the strict-liability regime under the Product Liability Directive. This double-track protection system allows the consumer compensation for damage that is not expressly provided for in Article 123 of the Consumer's Code,⁴ such as moral damage.

It remains to be seen whether the double-track protection system for injuries caused by a defect in a product will be permitted when the ICC's domestic no-fault system of product liability conflicts with the EU's Product Liability Directive. The EC legislature wanted to prevent this sort of tension when it adopted a product liability directive promoting maximal harmonization, based on the principles of Article 100 of the EEC Treaty (now Article 94 EC). In theory, Member States may not maintain or establish provisions that depart from Community-harmonizing measures in their fields of operation.

LIABILITIES FOR SALES OF GOODS

APPLICABLE WARRANTIES

Italian law distinguishes between warranty rules for the sale of goods to: (i) an entrepreneur ("B2B Sales") and (ii) a consumer ("B2C Sales").

B2B Sales

With regard to B2B Sales, the ICC requires the seller to provide the buyer with several warranties.

Defects warranty. Pursuant to Article 1490 ICC, the seller must warrant to the buyer that the sold goods are free from defects that may: (a) make the goods unsuitable for their intended use; or (b) considerably decrease the value of the goods (collectively, the "Defects").

The Defects warranty has a minimum term of one year, commencing on the date of delivery of the goods. Any agreement or contractual clause that excludes or limits the Defects warranty is not effective if the seller has intentionally hidden the Defects from the buyer.

The buyer may make a claim within eight days of the discovery of any Defects, unless the law or the parties provide a different term. Any late notice of Defects is ineffective.

As a remedy for breach of the Defects warranty, the buyer is entitled to ask for: (i) termination of the agreement; or (ii) a reduction of the purchase price. If, according to custom, termination of the agreement is excluded for

certain kinds of defects, the buyer may ask only for a price reduction.

If the buyer asks for termination of the agreement, the seller must also reimburse the purchase price to the buyer and all expenses lawfully borne by the buyer in connection with the purchase of the goods. On the other hand, the buyer must return the purchased goods.

Whichever remedy the buyer selects, the seller is obliged to pay the buyer for damage (including damage deriving from the Defects), unless the seller proves it acted without fault.⁵

Finally, the Defects warranty does not apply if: (a) the buyer was aware of the Defects before purchase; or (b) the Defects were easily identifiable, unless the seller declared that the goods were free from Defects.

Failure of the promised or essential qualities. Pursuant to Article 1497 ICC, the sold goods must have the qualities that: (a) the buyer promised; or (b) are essential for their intended use. Failing these qualities, the buyer is entitled to terminate the agreement, provided that, according to custom, the missing qualities are relevant. The buyer must request the termination of the agreement within eight days of the discovery of the failure of the represented or essential qualities, and the warranty has a maximum term of one year from the delivery of the goods.

Good running warranty. Pursuant to Article 1512 ICC, the seller may (but is not obliged to) warrant to the buyer the good running of the goods for a determined period of time. The good running warranty⁶ can be added to the Defects warranty but cannot replace it.

If the seller gives the buyer a good running warranty, the buyer must bring any claim within 30 days of the discovery of the defect concerning the running of the goods unless the parties agree otherwise. Any late notice is ineffective.

The good running warranty has a term of six months from the discovery of any defects concerning the running of the goods.

B2C Sales

The Consumer's Code applies to all sale agreements (and related warranties): (a) concerning "consumer goods"; and (b) between an entrepreneur (a person who enters into the sale agreement in connection with its business) and a consumer. The Consumer's Code defines "goods" to be

4 Article 123 of the Consumer's Code provides for the refund to the consumer of only: (i) damages resulting from death or personal injury caused by a defective product; or (ii) damage to or the destruction of any item of property other than the defective product itself.

5 According to Italian law, the basic principle of "fault" is that anyone should be able to contemplate the harm that his or her actions may cause and therefore should aim to avoid such actions. "Fault" is the liability for or cause of wrongdoing or the failure to do something to avoid harm for one's actions.

6 A good running warranty (*Garanzia di Buon Funzionamento*) guarantees that no product defects shall arise from the buyer's use.

any movable things, even if they are component parts or are to be assembled, except for, *inter alia*, water, gas, and electricity.

The Consumer's Code requires two kinds of warranties to accompany the sale of consumer goods:

Legal mandatory warranty. Under a legal mandatory warranty, the seller is obliged to deliver to the buyer consumer goods that are fully consistent with the parties' sale agreement. This consistency is assumed in certain cases, including, *inter alia*, where the goods are suitable for their intended use or have their represented qualities.

A legal warranty has a term of two years commencing from the delivery of the goods. The consumer must bring any claim within two months of the discovery of the inconsistency. Any late notice is ineffective.

The consumer is entitled to select one of three remedies for breach of the legal warranty: (a) substitution or repair of the goods or, upon the occurrence of certain conditions, (b) reduction of the purchase price, or (c) termination of the agreement.

Voluntary additional warranty. The seller may decide (but is not obliged) to provide to the buyer a voluntary additional warranty along with the legal warranty. The seller is strictly bound by the terms and conditions of any voluntary warranty. A voluntary warranty must comply with certain requirements of the Consumer's Code: it must indicate its term and the other main conditions and must be drafted in Italian. The voluntary warranty may supplement, but cannot replace, the legal warranty.

TORT LIABILITY OF THE MANUFACTURER

Pursuant to Article 103(d) of the Consumer's Code, a "manufacturer" is:

any manufacturer of goods or supplier of services, or an agent thereof, or any importer of goods or services within the European Union or any natural or legal person presenting himself as the manufacturer by identifying the goods or service with his own name, trademark or other sign having a distinctive character.

Furthermore, "anybody dealing with the sale, lease, hire or any other form of marketing of the product is considered a 'manufacturer' as long as it has dealt with transferring the product from the manufacturer to the consumer, including persons in charge of delivering the product for mere advertising purposes."

All goods sold in Italy must be safe for users. Goods are deemed "safe" if their ordinary or reasonably foreseeable

use (including their term of use, installation, and maintenance) cannot pose any risk or may pose risks so irrelevant that they are acceptable according to a high standard of protection of human health and safety, taking into account both the characteristics of the goods and the users who may run a risk by using them.

A good can be considered "defective" when it does not provide the safety that one can reasonably expect, taking all circumstances into account, including: (i) the way in which the good is distributed and its packaging, evident features, instructions, and warnings; (ii) the use to which the good can reasonably be placed on the market and the life cycle which the good can be reasonably expected to undergo; and (iii) the period during which the good was distributed. Finally, the good is considered to be defective if it does not offer the safety normally offered by similar goods.

The manufacturer is obliged to: (i) sell safe goods exclusively; (ii) provide the users with detailed information on the prevention and evaluation of any risk connected to the ordinary or reasonably foreseeable use of the goods; and (iii) adopt any possible measures to make the users aware of the product's risks and how to prevent them. In addition, the manufacturer is obliged to comply with applicable safety standards and rules for the goods.

Article 114 of the Consumer's Code provides for the manufacturer's tort liability. The manufacturer is liable for the damage caused to any third party by its defective goods. Any agreement or contractual clause that excludes or limits in advance such tort liability is null and void. Product liability also attaches to importers of products made outside the European Union (although the importer will be entitled to sue the manufacturer by filing an action for contribution). Administrative fines and criminal sanctions may also apply in case of breach of specific orders or measures adopted by the public authorities.

As consumers may not be aware of the distinction between a "trademark" and a "brand or merchandise mark," liability is not limited to the manufacturer of the defective product but is also extended to the product's marketer. If the name of the manufacturer is known to consumers, it shall be liable to the marketer.

The damaged party (which is not necessarily a consumer) must provide evidence of the defect, the injury or property damage, and the causal connection between the defect and the injury or damage.

Damages may be recovered for: (i) death and injuries caused by the defective goods; and (ii) the destruction and deterioration of assets other than the defective goods, provided those other assets are mainly and normally intended for private use by the damaged party. In the case

of other property damages, only damages exceeding €387 are refundable.

The damaged party must claim for damages within three years of the time he or she became aware (or should have become aware) of the damage, the defect, and the identity of the responsible person. Any late claim is ineffective. In any case, the damaged party's claim for damages is extinguished 10 years after the defective goods were placed on the market.

If more than one person can be deemed liable for the same damage, those persons are jointly and severally liable toward the damaged party. In addition, a person who has paid the damaged party has recourse against the other responsible persons. The liability is shared between all responsible persons on the basis of: (i) the risk attributable to each of them; (ii) the seriousness of each person's fault; and (iii) the consequences deriving from such fault.

Italian laws do not provide for punitive damages, and the Italian Supreme Court has ruled that punitive damages are contrary to public policy.⁷ Only in specific cases can there be liability for damages to some extent, irrespective of the actual loss.

Exclusion of Liability for the Manufacturer

According to Article 117 of the Consumer's Code, a manufacturer shall not have liability if:

- The manufacturer has not distributed the product;
 - Any damage-causing defect did not exist when the producer began distributing the product;
 - The defect is due to product compliance with a mandatory legal requirement or some binding measure;
 - The state of scientific and technical knowledge at the time at which the producer distributed the product would not have considered the product to be defective;
- or

- The defect is entirely due to the form of the product in which a component or raw material was incorporated or to the component supplier's compliance with the producer's instructions.

TORT LIABILITY OF THE SUPPLIER

Specific rules govern and limit the liability of a supplier of defective goods. The European Court of Justice has ruled that, in principle, liability for defective products as regulated by the Product Liability Directive lies with the manufacturer and will rest on the importer and distributor only when the manufacturer is not identified. In particular:

- The damaged party has the right to obtain from the supplier the manufacturer's name and address;
- If the supplier fails to reply to the request of the damaged party within three months and the manufacturer is not identified in any other way, the supplier is subject to the same liability as the manufacturer;
- In the case of a trial initially started against the supplier, the manufacturer can be requested to attend the trial at any time as an interested party. If the manufacturer does not challenge such a request and attends the trial, the trial continues exclusively against the manufacturer, and the supplier is considered free from any liability to the damaged party.

PRODUCT WARNINGS

As provided by Article 104 of the Consumer's Code, manufacturers may place only safe goods on the market. Manufacturers are required to provide consumers with all relevant information to enable them to assess the risks inherent in a good throughout its normal or reasonably foreseeable use, where those risks are not immediately obvious without adequate warnings. These warnings do not exempt manufacturers from compliance with other requirements of law.⁸

7 In Decision No. 1183/2007, issued on January 19, 2007, the Supreme Court held that, in the Italian legal system, damages are unrelated to the concept of punishment or to the wrongdoer's conduct. Rather, they are intended to compensate an innocent party to a contract or a person injured by a tort for a loss. The Italian legal rules on liquidated damages and compensation for moral damage are not of the same nature as punitive damages because punitive damages relate to the defendant's conduct, not to the plaintiff's loss. Moreover, they are characterized by a disproportion between the compensation granted and the injured person's loss.

In considering liquidated damages, the Court observed that, if an amount to which the parties agreed is found to be manifestly excessive, the judge can equitably reduce it. As for moral damages, the Court noted that the system of tort liability is intended to compensate a person injured by wrongdoing for a loss—not to punish the tortfeasor—by the payment of a sum of money that is intended to remedy the tort. Therefore, a connection must exist between the plaintiff's actual harm and the amount awarded in damages.

Thus, the Court found no analogy in either case with the concept of punishment inherent in punitive damages. It concluded that punitive damages have no equivalent in the Italian legal system and confirmed the view that foreign punitive damages awards conflict with public order and may not be recognized or enforced in Italy.

8 The producer shall adopt measures, commensurate with the characteristics of the products that they supply, enabling consumers to be informed of the product's risks. The producer must take appropriate action, including, when necessary, withdrawing a product from the market, adequately and effectively warning consumers, or recalling the product from consumers. According to Article 104, paragraph 4, of the Consumer's Code, these measures include: (i) indicating on the product or its packaging the producer's identity, details about the producer, and the product reference or, where applicable, the batch of products to which it belongs, except where the producer is reasonably justified in not providing that information; and (ii) sample testing of marketed products, investigating, and—if necessary—keeping a register of complaints and informing retailers of such monitoring activities.

Finally, the authorities can further require manufacturers to provide better warnings. The authorities can subject product marketing to prior conditions so as to make products safe.

Likewise, if a product presents risks to certain individuals, the authorities can require that any such individual be given notice of those risks in good time and in an appropriate form, including the publication of special warnings (e.g., special advertising on the web site of the producer or in the national newspapers). As provided in Article 112, paragraph 3, of the Consumer's Code, except where an action constitutes a more serious offense, producers or distributors failing to comply with the required special warnings shall be liable for a fine of €10,000 to €25,000.

LIABILITY FOR DANGEROUS ACTIVITIES—THE PRESUMPTION OF FAULT

Article 2050 ICC provides that whoever injures another party in carrying out an activity that is dangerous per se is strictly liable for damages unless the person proves that he or she adopted all possible measures in order to avoid the damage. Some Italian court decisions have applied this provision to the marketing and distribution of toxic chemical products and blood derivatives, which are considered “dangerous activities.” They have held manufacturers liable for not having taken the necessary measures to avoid damage after circulating the dangerous products, notwithstanding full compliance with applicable laws.

Like the strict product liability regime implemented in the Consumer's Code, Article 2050 ICC provides for a presumption of the defendant's liability, independent of the defendant's fault. In principle, Article 2050 ICC can apply only to products that are either “dangerous” by an express provision of law or likely to cause damage to the user even if appropriately handled. Furthermore, according to European Court of Justice decisions,⁹ Member States may not apply national strict liability systems that provide consumers with a higher level of protection than the Product Liability Directive.

THE OBLIGATION TO RECALL PRODUCTS

Article 104, paragraph 7, of the Consumer's Code requires producers and distributors, when they know or ought to know that a product which they have placed on the market poses hazards to the consumer incompatible with general

safety requirements, to immediately notify the competent authorities (to which Article 106, paragraph 1, refers) of the actions taken to prevent risk to consumers.

The new legislation imposes a number of additional duties on manufacturers and distributors. They must provide consumers with all information necessary to evaluate the risks arising from the product's normal and foreseeable use, adopt measures proportional to the product's characteristics that will enable the consumer to identify the risks, and take any necessary steps to avoid those risks.

Product recalls are regulated in greater detail in Article 104, paragraph 8, of the Consumer's Code. Manufacturers and distributors are required to organize direct removal of the products from consumers, destroy unsafe products, and support all related costs.

CRIMINAL SANCTIONS UNDER THE CONSUMER'S CODE

Article 112 of the Consumer's Code provides that the competent public authorities can forbid the placing on the market of any dangerous product and also adopt any necessary measures to ensure compliance with such a ban. As provided by Article 103, paragraph 1(b), of the Consumer's Code, a “dangerous product” is any product that does not meet the definition of “safe product.”¹⁰

A manufacturer placing a dangerous product on the market is criminally liable and may be punished with imprisonment of up to one year and a fine of €10,000 to €50,000. If his or her conduct involves the perpetration of a more serious crime, then the relevant criminal provision will also be applied (Article 112, paragraph 2).

Likewise, a manufacturer or distributor placing a dangerous product on the market in violation of a restriction order issued by the relevant authorities is criminally liable and may be punished with imprisonment of six months to one year and a fine of €10,000 to €50,000. If the conduct involves the perpetration of a more serious crime, then the relevant criminal provision will also be applied (Article 112, paragraph 1).

Criminal charges are brought against individuals only. According to basic principles of Italian criminal law, the

9 E.g., European Court of Justice Decisions No. C-52/00, *Commission of the European Community v. French Republic*; No. C-154/00, *Commission of the European Community v. The Hellenic Republic (Greece)*; and No. C-183/00, *María Victoria González Sánchez v. Medicina Asturiana, S.A.*
10 Article 103, paragraph 1, of the Consumer's Code states that a “safe product” is any product that (under normal conditions of use or those which may be reasonably foreseen, including shelf life and usage, installation, and maintenance requirements) presents no hazard or only minimal risks arising from the product's use and considered acceptable and consistent with a high level of personal health and safety, taking into account: (i) product characteristics, including its makeup, packaging, and instructions for assembly, installation, and maintenance; (ii) its effect on other products, where it can be reasonably foreseen that it will be used with other products; (iii) the product's appearance and packaging, its labeling, any warnings and instructions for use and disposal, and any other general information about the product; and (iv) those categories of consumers who are at risk when using the product (particularly children).

competent authorities shall analyze whether there is a direct connection between the individual's unlawful conduct and the consumer's damage.

In the absence of a ban, placing a dangerous product on the market is punishable with up to one year's imprisonment and the fine mentioned above.

Furthermore, in the case of potentially dangerous products, the authorities can temporarily ban their sale for the period needed to evaluate their safety. They can order that products already marketed be adapted to comply with safety requirements within a given deadline. Failure to comply with any of these requirements can bring a financial penalty ranging from €10,000 to €25,000. Fines of an administrative, noncriminal nature are imposed in cases of failure to cooperate with the authorities in carrying out product checks and acquiring information and samples.

BRIEF DESCRIPTION OF ITALIAN CIVIL PROCEEDINGS AND THE CLASS ACTION

PROCEDURAL OVERVIEW

The ordinary civil action in tribunal unfolds in three stages: introductory, proof-taking, and decision-making. The introductory stage begins with the drafting, filing, and service of the summons that initiates a case; states the legal and factual grounds upon which the prayer for relief is based; and describes the evidence that the plaintiff wishes to be considered.

An answer is filed, stating the defendant's denials, defenses, setoffs, counterclaims, and evidence. No sharp line divides the introductory from the proof-taking stage. Although new claims may not be brought, modification of legal, factual, and evidentiary grounds for the relief initially requested and for the defenses originally raised is usually permitted.

Evidence is taken during the proof-taking stage at various hearings, separated by periods of weeks or months. The Italian legal system does not have any principle resembling the U.S. discovery process. The plaintiff has the sole and full burden of providing conclusive and documentary evidence of its claims. Evidence is taken during the proceeding by the parties' filing of specific defensive briefs.

When the taking of evidence is complete, a final hearing takes place and the parties submit their final motions and arguments to the judge. After that hearing, the judge renders a judgment.

Appellate jurisdiction is vested in courts of appeal¹¹ composed of panels of three judges. Notwithstanding the fact

that only two hearings take place in the appellate proceedings (the first for the appearance and the second for the submission of final motions and arguments), the court of appeal usually issues its judgment three to four years from the date of service of the appeal.

Appellate judgments may be appealed on a point of law (e.g., breach of law or flawed reasoning) or procedure (e.g., nullity or lack of jurisdiction) before the Supreme Court. It is the highest general court in the land, and its functions include ensuring the correct and uniform application of the law. The Supreme Court usually issues its judgments three to four years from the filing of the petition to the Court.

THE ROLE OF JUDGES AND JURIES

In civil proceedings, judges hear and decide the cases (whereas in the criminal sphere, some crimes will be tried before a judge and jury). The proceedings are adversarial in nature and based on the claims made. The parties are the ones who must adduce the evidence. The court's inquisitorial powers are extremely limited but include those of appointing its own expert, ordering whatever inspections it deems useful for deciding the case, questioning the parties or persons to whom the parties have referred when setting out their case, and requesting "estimatory oaths." A judge may request an estimatory oath concerning the amount of damages if the claim for damages was proved but the amount could not be proved or was not ascertainable otherwise. However, in such a case, the judge shall determine the maximum amount of damages.

TIMING AND PLEADINGS

Ordinary proceedings are instituted by the claimant serving a writ of summons. The case is then docketed and a judge is assigned to it. The writ of summons must specify, *inter alia*, the parties' details, the claim, the facts and law underlying the action, and the sources of evidence on which the claimant will rely.

At least 20 days prior to the hearing, the defendant must enter an appearance by filing its statement of defense and associated documents with the court registrar. The statement of defense must include several items, failing which the defendant will be barred from raising them later:

1. Counterclaim;
2. Third-party claim (which will lead to the postponement of the first hearing to enable the third-party summons to be served); and
3. Procedural objections that the court cannot raise at its own motion (e.g., lack of jurisdiction over foreigners).

¹¹ Courts of appeal also have original jurisdiction in a number of specific matters, such as antitrust lawsuits, actions to set aside arbitral awards, and proceedings for recognition of foreign judgments.

The defendant must also state its position with respect to the claimant's arguments and specify its sources of evidence.

During the course of the proceedings and subject to the deadline set by the court at the first hearing (Article 183 of the Italian Civil Procedure Code), both parties will be afforded an opportunity to clarify and amend the claims and defenses already made (but not to raise new matters) as well as to specify new sources of evidence and submit further documents.

At the conclusion of the evidence-gathering stage, the court reserves judgment in the matter, subject to granting the parties time to file final briefs and replies. The court may also grant an oral hearing.

In product liability litigation, some advance technical findings may be useful, and to this end the claimant, prior to the commencement of the proceedings on the merits, may request the court to appoint an expert to verify that injury or damage has occurred and to determine the amount and cause of the damage. The duration of the first-instance (trial) proceedings depends on the case's complexity. These generally last up to two or three years (or even longer for particularly complex cases or where judges have very heavy workloads).

The judgment of the court of first instance is enforceable. However, in case of appeal, the losing party can file a petition to the court of appeal to suspend the enforcement upon showing serious and urgent reasons for the suspension. Although Italian law does not specify those reasons, Italian court decisions (*inter alia*, Supreme Court Decision No. 4060/2005, Court of Appeal of Bari, section No. III, issued on November 30, 2006) have found "serious reasons" where: (i) a huge payment order issued by the judge of the first instance shall have a relevant impact in *peius* on the losing party's financial condition; or (ii) the execution of the judicial order would cause serious and irreparable harm to the losing party.

LEGAL AND PROCEDURAL COSTS

During the proceedings, each party must pay its own costs. At the end of the proceedings, the general Italian rule is that the winning party shall obtain the refund of legal costs, including attorneys' fees, from the losing party. However, the court usually fixes the amount of legal costs to be paid by the losing party at an amount lower than the costs actually incurred by the winning party. Furthermore, the court can decide to set off in whole or in part the costs between the parties. Finally, when the claim is granted for an amount that does not exceed a settlement amount offered by one party and rejected by the other party without valid reasons, the party that refused to settle can be ordered to pay legal costs even though it has won in court.

CLASS ACTION

In Italy, the class action came into force in 2010. This new legal action allows each consumer or user to act for the protection of the rights of a determined class of persons. Associations that have received a mandate from consumers or users can also bring class actions. In Italy, specific associations (e.g., Adiconsum, Adusbef, and Codacons) are entitled to bring class actions on behalf of consumers seeking protection against damage caused by defective or unsafe products or unlawful activities (e.g., unlawful application of bank interests). Article 49 of Law No. 99 of July 23, 2009, amending Article 140 *bis* of the Consumer's Code, regulates the class action. A class action can be applied only to offenses completed after the effective date of Law No. 99/2009. Consequently, a class action must be based on unlawful conduct performed after August 15, 2009, that caused damage to consumers.

Any natural person who is sufficiently representative can bring a class action before the court of the capital of the region where the defendant (business entity) has its headquarters. If the business is not established in Italy, it may be sued in the place determined by applying the ordinary criteria for territorial jurisdiction.

The proceedings will require a preliminary decision on the admissibility of the class action in terms of:

1. Its not being clearly unfounded;
2. The absence of a conflict of interest;
3. The suitability of the claimant to represent the interests of the entire class; and
4. The identicalness of the class members' rights.

The class action is an opt-in one, and other claimants must join by the deadline set by the court at first hearing. Other collective actions against the same business enterprises may not be brought relating to the same facts.

Since Law No. 99/2009 went into effect, only two class actions have been introduced. The first judgment, rendered on May 27, 2010, by the Court of First Instance of Turin, decided that the class action was not admissible in a case involving alleged unlawful application of bank interest charges. In the second case, the Milan Court of First Instance allowed a class action related to tests for avian flu and the new flu H1N1 (swine flu).

PRODUCT LIABILITY LAW IN SPAIN

LIABILITY OF MANUFACTURERS

CIVIL LIABILITY

Historical legal regime

The user of defective goods benefits from several causes of action against the vendor or manufacturer. Several types of actions may enable the buyer of defective products to terminate the sale, decrease the sale price, or receive compensation for damage.

- Latent defects (*vicios ocultos*, Article 1484 et seq. of the Spanish Civil Code¹);
- “Common” civil liability whether tortious (Article 1902 et seq.² of the Spanish Civil Code) or contractual (Article 1101 et seq.³ of the Spanish Civil Code);
- Strict liability of the manufacturer of a defective product (Articles 128 to 149 of the Legislative Royal Decree 1/2007, of November 16, which approves the combined texts of the General Law for the Defense of Consumers and Users and other complementary pieces of legislation (*Real Decreto Legislativo 1/2007, de 16 de noviembre, que aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*; “LRD 1/2007”).

The first specific regulation on liability for damage caused by products was established by Law 26/1984, of July 19, for the Defense of Consumers and Users (*Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios*; “Law 26/1984”). Without going into detail, that law allowed a claim for any type of damage caused by the use or consumption of a product. It also contained a special strict liability system with very limited possibilities of defense for certain products and services (food, hygiene and cleaning products, cosmetics, medicinal products, sanitary services, gas and electricity supply, electrical appliances, elevators, means of transport, motor vehicles, and toys and products for children).

When Spain had to implement EU Directive 85/374/EEC of July 25, 1985, on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (the “Product Liability Directive”), it did not amend the relevant provisions of Law 26/1984, but rather enacted a completely new law dedicated only to implementation of the Product Liability Directive. That piece of legislation was Law 22/1994, of July 6, on Civil Liability for the Damages Caused by Defective Products (*Ley 22/1994, de 6 de julio, sobre Responsabilidad Civil por los Daños Causados por Productos Defectuosos*; “Law 22/1994”).

Law 22/1994 limited the rights of consumers with respect to the provisions of Law 26/1984, particularly its special regime of strict liability. Doubts arose as to whether both legal regimes could be applied to the same case. The judgment of the European Court of Justice of April 25, 2002 (Case C-183/00, *María Victoria González Sánchez v. Medicina Asturiana, S.A.*), answered that question:

[T]he rights conferred under the legislation of a Member State on the victims of damage caused by a defective product under a general system of liability having the same basis as that put in place by the Directive may be limited or restricted as a result of the Directive’s transposition into the domestic law of that State.

In view of the judgment, and of the final and transitory provisions of Law 22/1994, Law 26/1984 could not be applied to any damage caused by defective products that were put into circulation after July 7, 1994 (the effective date of Law 22/1994). However, it has not been uncommon after 2002 to see cases where claimants have still tried to ground their claims on both legal regimes.

In 2007, LRD 1/2007 repealed Law 26/1984 and Law 22/1994. However, it expressly maintains, in its Third Transitory Provision, a legal regime that contains mainly the same provisions of Law 26/1984 for products put into circulation

1 Article 1484 of the Civil Code: “The seller is bound to remedy [either through compensation or by the termination of the contract] hidden defects of the thing sold which render it unfit for the use for which it was intended, or which so impair that use that the buyer would not have acquired it, or would only have paid a lower price for it, had he known of them”

2 Article 1902 of the Civil Code: “Anyone who, by his acts or omissions, harms another, acting with fault or negligence, is obliged to repair the damage caused.”

3 Article 1101 of the Civil Code: “Those who, in the fulfillment of their obligations, act with bad faith, negligence or delinquency [*morosidad*], and those who in any way contravene the purpose of their obligations, are subject to compensate the damages and prejudices caused.”

before July 8, 1994, and it essentially keeps the wording of the articles of Law 22/1994 for liability on defective products, although it gives them a different numbering.⁴

In sum, under the Spanish legislation currently in force, a person who has suffered damage caused by a defective product has two actions available for claiming a liability in tort:

- The one in LRD 1/2007 (strict liability); or
- The general action for tort liability (fault or negligence of the defendant has to be proved, although case law has softened that requirement and even reversed the burden of proof of the fault or negligence under certain circumstances) set forth in Article 1902 of the Civil Code.

LRD 1/2007

In the first place, LRD 1/2007 defines the “producer.” Pursuant to Article 5 of LRD 1/2007, the producer is the manufacturer or the importer of the product into the European Union, as well as any other entity that presents itself as a producer by putting its name, trademark, or other distinguishing feature on the packaging or marketing materials of the product. This concept of “producer” has to be linked to Article 138 of LRD 1/2007, which states that producers are, in addition to those defined in Article 5 of LRD 1/2007, those who manufacture or import into the European Union a finished product, a component, or a raw material.

The concept of “defective product”⁵ is also defined in the Product Liability Directive and LRD 1/2007. Pursuant to Article 137 of LRD 1/2007, a product is defective “when it does not provide the safety that can be legitimately expected from it,” taking all circumstances into account, particularly its presentation, its reasonably expected use, and the time when the product was put into circulation. Spanish legislation has added that a product will be considered defective if it does not provide the safety usually provided by the same products of the same series. A product shall not be considered defective for the sole reason that a safer product was made later.

Spanish legislation does not contain any specific regulation related to the reason why the product is defective (such as a manufacturing defect, a design defect, or failure to warn), but rather considers a product to be “defective” if it does not pass the test of product “safety.” As a consequence, products can be found to be defective on the basis of manufacturing defects, design defects, or failure to give proper information about the product risks.

Liability resulting from defective products is based on strict liability. The injured person is required to prove the damage, the defect, and the causal relationship between defect and damage (Article 139 of LRD 1/2007). Unlike strict liability for defective products, traditional Spanish civil liability rules require the offender to have acted with fault or negligence for it to be liable.

It is not uncommon for the courts to take into account a claimant’s difficulty in proving the existence of a defect in a product (especially when the defect is a manufacturing or design defect, each of which is complex to evidence from a technical perspective). This can lead, in practical terms, to a reversal of the burden of proof about the existence of the defect. If the claimant is able to show the absence of fault with respect to the use of the product and to exclude reasons for injury other than a product defect, then the manufacturer should be prepared to prove that the product is not defective. Some precedents have accepted the manufacturer’s proof showing that its processes and controls would make the alleged defect very unlikely.

The producer’s defenses to mitigate or escape liability are limited to those set in Article 140 of LRD 1/2007. The producer shall not be liable if it proves that:

- It did not put the product into circulation;
- The defect did not likely exist when the product was put into circulation;
- The product was neither manufactured for sale or any form of distribution for economic purpose, nor manufactured, imported, supplied, or distributed by the producer in the course of its business;
- The defect is due to compliance of the product with mandatory regulations issued by the public authorities;
- The state of scientific and technical knowledge when the product was put into circulation did not enable the discovery of the defect. Spain, making use of Article 151.(b) of the Product Liability Directive, has excluded the state-of-the-art defense for producers of medicinal products, food, or alimentary products for human consumption; and
- In the case of a manufacturer of a component, the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the product manufacturer.

The producer’s liability may be reduced or disallowed when the damage is caused both by a defect in the product and by the fault of the injured person or any

4 Although we will not enter into any detail, as it exceeds the aim of this chapter, it shall be noted that LRD 1/2007 keeps the special strict liability regime of Law 26/1984 for a number of services, including sanitary services; repair and maintenance of electrical appliances, elevators, or motor vehicles; maintenance and installation of gas and electricity supply; and means of transport. This regime will also be applied, when no other specific legal regime governs, to those who build or market homes for damage caused by defects in the homes.

5 According to Article 136, the concept of “product” for the purposes of this liability includes not only electricity (as stated in the Product Liability Directive), but also gas.

person for whom the injured person is responsible (Article 145 of LRD 1/2007). The reduction of the producer's liability will be determined on a case-by-case basis, and it will depend on the degree of the injured party's intervention in the damage caused.

A civil action based on LRD 1/2007 is subject to two limitation periods:

- The injured party has three years to initiate legal proceedings for the recovery of damages. The limitation period begins to run from the date when the injured party suffered the damage, provided that he or she is aware of the identity of the person responsible for causing the damage (Article 143 of LRD 1/2007). Spanish legislation differs from the provisions of the Product Liability Directive (Article 10.1), which state that the limitation period will begin to run on the day on which the plaintiff became aware of the damage, the defect, and the identity of the producer. The Spanish rule was introduced to obtain more legal certainty on the date when the limitation should start to run.⁶
- The producer's liability expires at the end of 10 years from the date on which the producer put the product into circulation, unless the injured person has in the meantime initiated legal proceedings against the producer (Article 144 of LRD 1/2007).

An action under LRD 1/2007 (strict liability) may recover for death, personal injury (including costs associated with the treatment of the relevant injury and loss of earnings), and damage exceeding €390.66 that occurred to items of property (other than the defective product itself), provided that those items are objectively intended for private use or consumption and have been dedicated mainly to such use or consumption by the injured person. A general action for tort liability may recover the rest of the injured party's damages. Those additional damages include damages for the defective product itself, moral damages,⁷ and damages for other items of property that are intended for production or professional use.

According to Article 141.b) of LRD 1/2007, the aggregate liability of a producer for damages resulting from death or personal injury caused by identical items with the same defects shall be limited to the amount of €63,106,270.96.

Spanish law does not specify any compulsory method for valuing personal injuries. In practice, both claimants and courts use a scale established for injuries incurred in traffic accidents,⁸ which is updated every year when determining the amount of compensation. This scale provides a compensation for death, depending on the identity of the claimant and the age and financial situation of the decedent; compensation for permanent or temporary disability; and a method of calculating the amount to be paid for the time needed to achieve full recovery.

Moral damages are even more difficult to quantify. It is necessary to consider the circumstances in each case and to value the type and severity of the injury (e.g., pain and suffering or aesthetic damage).

Spanish law does not allow punitive damages. A defendant can be compelled to compensate only the actual damage proved by the claimant.

Class Actions

Under Spanish legislation on civil procedure, certain groups of injured parties may bring claims in a way that has similarities with class actions. These actions were created to allow better recovery against illegal behaviors that have caused damage to a group of consumers, allowing better protection of both collective interests⁹ and diffuse ones.¹⁰

Article 11¹¹ of Law 1/2000, on January 7, of Civil Procedure (the "LCP") states that associations of consumers and users legally incorporated shall have standing to defend in court the rights and interests of their members, those of the association, and the general interests of consumers and users.

6 The limitation period for the action based on Article 1902 of the Civil Code is only one year. However, its period begins to run on the date when the action could have been exercised (Article 1968.2 of the Civil Code). This provision has been interpreted in favor of claimants. For example, some case law holds that, in cases of personal injury, the limitation period shall not start to count until the injured party knows the full extent of the injury, as that is the moment when the claimant is ready to file the claim. This situation has made it difficult for defendants to succeed in alleging that claims are time-barred and has come under criticism by legal scholars.

7 There is no legal definition of "moral damages." However, case law has interpreted them as being compensation for injury to personal rights. Moral damages may arise, for example, when a person's health, beliefs, honor, freedom, privacy, or feelings are affected by illegal conduct.

8 Annex of Legislative Royal Decree 8/2004, of October 29, which approves the combined texts of the Law of Civil Liability and Insurance in Circulation of Motor Vehicles (*Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el texto refundido de la Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos a Motor*). This scale includes moral damages. Therefore, if LRD 1/2007 is the only legal provision alleged by the claimant, the defendant may argue that the eventual award should be less than the amount set in the scale, as LRD 1/2007 does not permit moral damages.

9 Those interests of a group of consumers and users where the identity of the affected ones has been determined or is easy to determine (e.g., those affected by the cancellation of a flight).

10 Those interests of a group of consumers whose identity is undetermined or very difficult to determine (e.g., those affected by an interruption of service by a mobile phone company or by a batch of defective food items).

11 The rules of Article 11 are general, so they will apply when no special laws confer legal standing.

When the associations or cooperatives do not fulfill the requirements of LRD 1/2007 or the regional legislation, they are able to represent only the interests of their members and those of the association, not the general interests, collective or diffuse, of consumers and users (Article 24 of LRD 1/2007).

When a group of consumers and users whose members are easily determined have been injured, legal standing to represent those collective interests is given to the associations of consumers and users; the legally constituted entities whose purpose is the defense or protection of the collective interest; and the groups of affected persons.¹² When it is impossible or very difficult to determine the identity of those who have been injured, legal standing is limited to the associations of consumers and users that are representative according to certain legal criteria.¹³

Others have legal standing to defend the collective and diffuse interests of consumers and users: the Public Prosecutor, entities authorized by European legislation, the National Institute of Consumption, and the organizations and entities of the Autonomous Regions and local corporations with competence in the defense of consumers (Articles 11.4 of LCP and 54 of LRD 1/2007).

In proceedings brought by associations, by entities constituted for the protection of the rights and interests of consumers and users, or by groups of affected persons, the LCP states that those who have suffered damage have to be called to the proceeding,¹⁴ in order to allow them to assert their individual rights or interests (Article 15 of LCP), if they deem it convenient.

In the case of proceedings where the injured persons are known or easily determined, the plaintiff shall have previously communicated its intention of filing a claim to those concerned, and after the call made by the court, the affected individuals may appear in the proceeding at any time, but they may carry out only those procedural acts that have not expired (e.g., if the term for filing the writ of defense has elapsed, the party who has appeared afterwards will not be allowed to file such writ of defense). The LCP allows the plaintiff to ask the court to take measures to determine the identity of the injured persons, including requesting the defendant to cooperate (Article

256.1.6° of LCP). If the defendant refuses to cooperate, the court may order the necessary intervention measures, including entry and search, to find the documents or information requested. The defendant may also have criminal liability for disobeying a court order (Article 261.5^a of LCP).

In the case of proceedings where the injured parties are unknown or difficult to determine, the call made to the affected individuals shall suspend the course of the proceedings during a period no longer than two months. The proceedings will then resume, including all of the individuals who have appeared as parties, and after this stage, no further individual appearances will be allowed.

An individual's appearance in the proceeding implies that he or she will be a plaintiff independent from the group, with all rights and obligations resulting from a claim of his or her individual right or interest.

Article 221 of the LCP regulates the judgment in cases initiated by associations of consumers and users. Affected individuals who have not been party to the proceedings may benefit from the judgment, substantially increasing the judgment against the defendant.

The judgment shall, in the first place, determine those specific individuals who can benefit from the ruling. When individualization is not possible, the judgment shall state the data, features, and requirements necessary for an affected individual to demand payment and, as the case may be, to request enforcement of the judgment, or to take part in the enforcement proceedings, when the claimant association requests enforcement. The court must recognize those who are beneficiaries of the judgment, subject to the relevant individuals' proving that they fulfill all requirements and features to demand the payment set in the judgment. The court will set forth its decision through an order, which will provide the right to enforce the judgment (Article 519 of LCP).

If the judgment contains, instead of an award of money, a declaration stating that a specific activity or behavior is unlawful, the judgment shall determine whether it has procedural effects beyond those who have been party to the relevant proceedings.

12 Article 6.1.7° of the LCP recognizes the capacity to be party to the proceedings of a group of consumers and users only when the majority of those affected belong to the group.

13 Associations of consumers and users legally representative on a national basis are those that are registered with the National Registry of Associations of Consumers and Users. If the scope of the case is limited to one Autonomous Region, the requirements of the associations to be considered representative will be determined by the legislation of that particular Region. Further details on the requirements for inclusion in the National Registry can be found in Articles 22 to 37 of LRD 1/2007.

14 This call shall be made by the court clerk (*Secretario judicial*), who shall publish the admission of the claim in the media with coverage in the territory where the damage of those rights or interests has occurred.

When individual consumers and users have been party to the proceedings, the judgment has to expressly decide their claims.

Finally, it shall be noted that the judgment will have the effect of *res judicata* not only between those who have been party to the proceedings, but also for those individuals who have the same rights as those that have been decided in the proceedings.

CRIMINAL LIABILITY

Traditionally, Spanish criminal liability applied only to individuals, according to the premise *societas delinquere non potest* (legal entities cannot commit a criminal offense). However, since December 23, 2010, legal entities may also commit certain criminal offenses (such as those related to unpaid taxes, drugs, and bribery), but not any of the offenses discussed below.

The criminal offenses, which we will describe, apply to persons acting on an individual basis or as the directors or managers of a company. Article 31 of Organic Law 10/1995, of November 23, on the Criminal Code (the “Criminal Code”) provides that those who act as de facto or legal directors of a company, or in legal or voluntary representation of another person, may be held personally liable (even if the director or manager has not personally violated conditions for the criminal offense), provided that the company they represent has committed the criminal offense.

Nevertheless, criminal liability requires an action or omission of the director that causes or allows the criminal offense to take place. The concept of legal or de facto directors, or the one of representative, seeks to identify the individual or individuals who have the effective control and direction of the company’s activities. Therefore, directors

and managers may avoid incurring criminal liability if they can prove that they did not take part in the relevant actions or that they delegated the functions which resulted in the commission of the criminal offense to someone with the capacity (the knowledge, the authority to make decisions, and the economic resources to implement the decisions) to have avoided the offense.

Two groups of criminal offenses might be related to harmful products or services:

- If the criminal behavior has caused death or injury to people, the criminal offenses of homicide or injury may apply. In most cases, the criminal offense will have been committed not intentionally, but as a result of imprudence or negligence, which significantly reduces the punishment (in less severe cases, the penalty may consist only of a fine); and
- A second group of criminal offenses punishes the creation of a risk. Their intention is to prevent damage before it takes place.

This second group of criminal offenses is found under Articles 359 to 366 of the Criminal Code, in a chapter that deals with criminal offenses against the public health:

- Production or illegal traffic of substances harmful to health (Articles 359¹⁵ and 360¹⁶ of the Criminal Code). The offender will normally be the producer, the seller, or any other person involved in the commercial transactions. The criminal offense may be committed by acting without authorization (Article 359) or selling or supplying those products without complying with the provisions that regulate them (Article 360);
- Crimes related to medicinal products (Articles 361¹⁷ and 362¹⁸ of the Spanish Criminal Code). The offenses

15 Article 359 of the Criminal Code: “The person who, without being duly authorized, produces substances harmful for health or chemical products which may cause ravages [estragos], or sells or provides them, or trades with them, shall be punished with imprisonment from six months to three years and fine from six to twelve months, and special disqualification from profession or industry from six months to two years.” Fines are expressed as a period of time rather than an amount of money. For the imposition of the fine, the court will determine an amount to be paid per day (ranging from €2 to €400) and the duration of the fine. Thus, in this particular case, the fine may range from €2 for six months (all months are considered to have 30 days), i.e., €360, to €400 for 12 months, i.e., €144,000.

16 Article 360 of the Criminal Code: “The person who, being duly authorized for the traffic of the substances or products mentioned in the previous article, sells or supplies them, failing to comply with the formalities prescribed in the respective Laws and Regulations, shall be punished with fine from six to twelve months and disqualification from profession or trade from six months to two years.”

17 Article 361 of the Criminal Code: “Those who sell or deal with damaged or expired medicinal products, or medicinal products which do not comply with the technical requirements related to their composition, stability and effectiveness, or those who replace some of them with others, and in such a way that they endanger people’s life or health, shall be punished with imprisonment from six months to two years, fine from six to eighteen months and special disqualification from profession or trade from six months to two years.”

18 Article 362 of the Criminal Code: “1. The following shall be punished with imprisonment from six months to three years, fine from six to eighteen months and special disqualification from profession or trade from one to three years:

“1º The one who alters the quantity, the dose or the original composition of a medicinal product, as authorized or declared, either when it is being manufactured or produced or in a subsequent moment, depriving the medicine, totally or partially, of its therapeutic efficacy, and in such a way that he endangers the life or health of people.

“2º The one who, with the intention of selling or using them in any way, imitates or simulates medicines or substances that produce health benefits, giving them the appearance of being real, and in such a way that he endangers the life or health of people.

“3º The one who, knowing its alteration and with the aim of selling or dedicating them to the use of other people, has on deposit, announces or advertises, offers, displays, sells, provides or uses in any way the said medicinal products, and in such a way that he endangers the life or health of people.

“2. The penalties of disqualification foreseen in this article and the previous ones will be of three to six years when the acts have been committed by pharmacists, or by the technical directors of legally authorized laboratories, in which name or representation they act . . .”

consist mainly of selling deteriorated medicinal products—those that have exceeded the expiration date for their consumption or do not comply with the relevant technical requirements—creating a risk for the life or health of people (Article 361); or of altering the amount, dosage, or composition of a medicinal product, eliminating or diminishing its effects; imitating or simulating a medicinal product or other product that has beneficial effects for health; or offering, displaying, advertising, or selling medicinal products, knowing that they have been altered, provided that the actions create a risk to the life or health of people (Article 362). In order to apply these criminal offenses, it is necessary to analyze the compliance of the relevant product with the applicable regulations. The main piece of legislation with respect to medicinal products is Law 29/2006, July 26, of Guarantees and Rational Use of Medicinal and Sanitary Products (*Ley 29/2006, de 26 de julio, de Garantías y Uso Racional de los Medicamentos y Productos Sanitarios*); and

- Crimes related to food (Articles 363,¹⁹ 364,²⁰ and 365²¹ of the Spanish Criminal Code). These criminal offenses mainly punish putting people's health at risk by supplying food that does not comply with the relevant regulatory provisions (Article 363); altering food with nonauthorized additives (either directly or through the supply of illegal substances to animals intended for human consumption; Article 364); or contaminating food or water with infectious or harmful substances (Article 365). In order to determine whether a criminal offense has been committed, it is necessary to consider the regulations dealing with food, such as the Spanish Alimentary Code.²²

Although the criminal liability for these offenses applies to individuals, Article 366 of the Criminal Code provides that the establishment, factory, or laboratory where the criminal offense was committed may be closed for up to five years or, in extremely severe cases, permanently.

LIABILITY OF DISTRIBUTORS, SELLERS, AND RETAILERS

Distributors, sellers, and retailers may be liable under the same conditions that apply to the producer. Even if the supplier (distributor, seller, or retailer) of the product is not the importer or the apparent manufacturer, it can be considered the producer (Article 138 of LRD 1/2007) if it cannot inform the injured person of the identity of the producer or importer of the product within three months (the Product Liability Directive stipulates identification only “within a reasonable time”). It will be liable in any case when it has supplied the product despite knowing that it was defective (Article 146). Distributors, sellers, and retailers may also incur civil liability (under the general rules of the Civil Code) or criminal liability in the terms described in the previous section.

LIABILITY OF COMPONENT AND RAW MATERIAL SUPPLIERS

Manufacturers or importers of any component or raw material are considered to be “producers” by Article 138 of LRD 1/2007. They are liable for the defects of the components or raw materials that caused the defect of the product.

However, these manufacturers will not be responsible if they are able to prove that the defect was caused by the design of the product in which the component has been incorporated or by instructions given by the manufacturer of the finished product.

In practice, claims against the manufacturers of components are not common because the injured party does not usually have sufficient information to know that a specific component caused the product defect or to identify the component manufacturer.

19 Article 363 of the Criminal Code: “The penalty of imprisonment from one to four years, fine of six to twelve months and special disqualification from profession, trade, industry or commerce from three to six years shall be imposed on producers, distributors or traders who put in danger the health of consumers by:

“1. Offering in the market foodstuff omitting or altering the requirements foreseen in the laws and regulations about expiration dates or composition.

“2. Manufacturing or selling beverages or foods intended for consumption by the public which are harmful for health.

“3. Trafficking with rotten items.

“4. Manufacturing products that have a use which is not authorized and which is harmful for health, or trading with them.

“5. Hiding or removing items intended to be made useless or to be disinfected, in order to trade with them.”

20 Article 364 of the Criminal Code: “1. The one who alters with additives or other nonauthorized agents capable of causing damage to people's health foodstuff, substances or beverages intended for the alimentary trade, shall be punished with the fines of the previous article. If the offender were the owner or responsible for production by a factory of foodstuff, the penalty of disqualification from profession, trade, industry or commerce from six to ten years shall be added.

“2. The same penalty shall be imposed on the one who carries out the following conduct:

“1°. To administer to animals of which the meat or products will be dedicated to human consumption nonauthorized substances which generate risks for the health of people, or in doses higher than or for purposes different from those authorized ones.

“2° To sacrifice livestock or to dedicate its products to human consumption knowing that they have been administered the substances mentioned in the previous section. . . .”

21 Article 365 of the Criminal Code: “The one who poisons or adulterates with infectious substances, or others that can be severely harmful for health, drinking water or foodstuff dedicated to consumption by the public or by a community of people, shall be punished with the penalty of imprisonment from two to six years.”

22 Approved by the government through Decree 2484/1967, of September 21.

In addition, when more than one person or entity can be held liable for a defective product, their liability to the injured person will be joint and several. Therefore, claimants do not need to bring their claims against the component manufacturers. The defendant who has compensated the claimant may recover from the other liable persons or entities an amount proportional to the liability of the others responsible.

PRODUCT RECALLS AND GOVERNMENT ADMINISTRATIVE INVESTIGATIONS OF PRODUCT DEFECTS

Directive 2001/95/EC of December 3, 2001, on General Product Safety (the “GPSD”) deals with product safety, including the obligation of the manufacturer and distributor to provide the competent authorities with immediate information when they “know or ought to know, on the basis of the information in their possession and as professionals, that a product that they have placed on the market poses risks to the consumer that are incompatible with the general safety requirement” (Article 5 (3) of GPSD). Spanish law has implemented this legal obligation and specified the professionals who must meet this safety obligation.

THE GENERAL SAFETY OBLIGATION UNDER SPANISH LAW

Spain implemented the GPSD through Royal Decree 1801/2003, of December 26, on General Product Safety (*Real Decreto 1801/2003, de 26 de diciembre, de Seguridad General de los Productos*; “RD 1801/2003”). It states that *producers and distributors* must place only safe products on the market.

DEFINITION OF “PRODUCERS” AND “DISTRIBUTORS”

The term “producer” under Article 2.d) of RD 1801/2003 encompasses:

- The product manufacturer when it is set in the European Union and any other entity presenting itself as the manufacturer by affixing to the product its name, trademark, or other distinctive mark, or the entity that reconditions the product;

- The manufacturer’s representative when the manufacturer is not established in the European Union or, if there is no representative established in the European Union, the importer of the product; and
- Other professionals in the supply chain, insofar as their activities may affect the product’s safety.

A “distributor” is defined as any professional in the supply chain whose activity does not affect the safety of a product (Article 2.e) of RD 1801/2003).

Both the producer and the distributor have several obligations under RD 1801/2003 when one of their products is not safe. They must notify the authorities of the risk and cooperate with the authorities to adopt appropriate measures (Articles 6.1²³ and 6.4²⁴ of RD 1801/2003).

Both producers and distributors are subject to a general safety obligation for the products that they put on the market. The definition of a “safe product” is contained in Article 2.a) of RD 1801/2003: it is a product that, under normal or reasonably foreseeable conditions of use, including the duration of use and its service, installation, and maintenance requirements, presents no risk at all or risks so minimal as to be compatible with a high level of protection for the health and safety of persons. A number of elements need to be taken into account when determining whether a product is safe. They are listed in both the GPSD and RD 1801/2003 (e.g., the instructions of the product or the categories of consumers at risk when using the product). RD 1801/2003 states that product advertising should be considered, while there is no such express reference in the GPSD.

SCOPE OF THE PRODUCER’S AND DISTRIBUTOR’S OBLIGATIONS

Producers have to inform consumers and users, through adequate means, about those risks which are not immediately obvious and which may arise in the normal and foreseeable use of their products, taking into account their nature and duration and the people at whom the products are aimed (Article 4.2 of RD 1801/2003).

The actions that must be taken by a producer (and, for those contained in Article 6, also by a distributor) are listed in Articles 4.3 and 6 of RD 1801/2003:

23 Where producers and distributors know or ought to know, on the basis of the information in their possession and as professionals, that a product which they have placed on the market or supplied to consumers in Spain poses risks that are incompatible with the general safety requirement, they shall immediately inform the competent authorities of the affected Autonomous Region.

24 Producers and distributors shall, within the limits of their respective activities, cooperate with the competent authorities on the actions taken to avoid the risks posed by products they supply or have supplied. In particular, they shall provide all of the appropriate information the authorities request, including that information which may be protected by commercial or industrial secrets (this last possibility is not expressly mentioned in the GPSD, which does refer to requiring “all necessary information from the parties concerned” in Article 8.1.(a).(ii)), within five days, except in urgent cases, when the term can be shorter. The information protected by commercial or industrial secrets will be neither divulged nor used for any other purpose.

- The producer has to **remain informed** of the risks posed by its products and duly inform the distributors (Article 4.3.a). For this purpose, the producer shall keep a register of complaints, study those complaints that may indicate a risk and, as the case may be, carry out sample testing (or other adequate controls) of marketed products;
- If it discovers, or has enough evidence leading it to believe, that it has placed on the market a product which is not safe, then it shall **take**, without any prior requirement by the authorities, **the appropriate actions** to prevent the product risks, including warning consumers (by means, as the case may be, of special advertisements), withdrawing the product from the market, or recalling the product from consumers (Article 4.3.b);
- The producer has to **indicate**, on the product or on its packaging, the identity and details of the producer and the product reference or, where applicable, the batch of products to which it belongs, absent some justification not to do so (Article 4.3 c)). This information has to be kept for three years, except for products that have a “best before” date for their consumption; in that case, the information must be kept for one year after the expiration of the “best before” date;
- The producer must **cooperate with the relevant administrative authorities**, as required to take actions to avoid the risks of the products (Article 6.4);
- The producer must **maintain under control** the products that are subject to restrictive measures and not dispose of them until the authorization of the relevant administrative authorities has been received (Article 6.5); and
- The producer must **notify the authorities of the existing risk posed by a product placed on the market or supplied to consumers in Spain** (Article 6.1). The notification has to be filed with the competent organization of the Autonomous Region where the producer or distributor has its registered offices. If the product has been marketed in several Autonomous Regions, the Autonomous Region of the registered offices of the relevant producer or distributor shall immediately send the notification to the National Consumption Institute (*Instituto Nacional del Consumo*) so that it can inform the rest of the affected Autonomous Regions. The notification shall contain, at a minimum, information that allows precise identification of the product or batch of products; a complete description of the risk posed by the product; all of the useful information available for locating the product; and a

description of the measures adopted to prevent the risks to consumers (Article 6.2).

The European Commission has adopted a guide to make the notification process easier for producers and distributors. This guide details the practical aspects of the process, and it contains a standard application for making the notification to the relevant authorities. The form can be submitted electronically through an internet web page, allowing the use of a single document to notify several affected Member States.²⁵

Once a national authority has been made aware of a product's safety risk, depending on the extent of the risk incurred, the authority may be compelled to pass the information to the European Commission through the RAPEX system.²⁶

Article 5 of RD 1801/2003 imposes certain obligations on distributors: they shall not distribute products that they know, or should know as professionals, are unsafe; they shall act diligently to comply with the applicable safety requirements, particularly during the products' storage, transport, and display; and they shall participate in the surveillance of the products' safety by informing the authorities and the producers of risks of which they become aware, providing—and retaining for three years—information about the origin and destination of the products, and collaborating in the measures adopted for preventing risks.

According to Articles 8, 9, and 10 of RD 1801/2003, the authorities, either as the result of a complaint or on their own motion, may take the measures necessary to prevent risks to consumers. The measures adopted shall be proportional to the risks and the least restrictive of those possible. If the producers and distributors do not adopt the necessary measures for the prevention of the risks, the authorities may take those measures, including, among other things, prohibiting placement of the product on the market, withdrawing it from the market, or even, as a last resort, recalling it from consumers. Article 11 of RD 1801/2003 regulates the administrative proceedings that shall be followed in these cases.

Finally, the lack of compliance with the provisions of RD 1801/2003, or obstructing the measures adopted by the administrative authorities to prevent a risk, may lead to the imposition of sanctions as set forth in Law 14/1986, April 25, General of Health (*Ley 14/1986, de 25 de abril, General de Sanidad*) and in LRD 1/2007 (Article 8.4 of RD 1801/2003).

²⁵ This application form is available online at <https://webgate.ec.europa.eu/gpsd-ba>. The Commission has also issued guidelines on how to prepare and submit this notification form. These guidelines are available at <https://webgate.ec.europa.eu/gpsd-ba/help.pdf> (web sites last visited August 15, 2012).

²⁶ RAPEX is the European Union rapid alert system for all dangerous consumer products, with the exception of food, pharmaceuticals, and medical devices. It allows for a fast exchange of information between Member States.

Depending on the type and severity of the violation, the sanctions may consist of fines up to €601,012.10 (or up to five times the value of the products or services that caused the infringement) and temporary closure of the establishment or factory for up to five years.

PRACTICAL ADVICE

Pretrial discovery. This is not contemplated by Spanish procedural legislation. During the proceedings, the parties are allowed to request specific, clearly identified documents from other parties, but not to make general requests.

In Spain, information shared with an external lawyer with the aim of obtaining legal advice in the context of litigation or prelitigation, or for the client's defense, is protected in a way similar to the "attorney-client privilege."

Insurance. Article 131 of LRD 1/2007 enables the government to establish mandatory insurance for civil liability arising from damage caused by defective products, along with a guarantee fund to cover, totally or partially, damages resulting from death, intoxication, and personal injury. However, the provision has not yet been developed.

Contingency fee basis. In Spain, the attorney may agree with the client to be paid with a percentage of the damages awarded.

Legal costs. Article 394 of the LCP provides that the losing party shall pay the costs of the first instance, unless the court believes the case posed serious doubts (regarding either the factual or the legal grounds). Nevertheless, there is a legal limit for the costs that, in general, may be recovered from the losing party with respect to the fees of the attorneys and the other professionals not subject to official rates. Compensation for these items cannot exceed a third of the amount discussed in the proceedings for each party who can benefit from the ruling. Moreover, the legal costs are ordinarily calculated on the basis of recommendations of the court's bar. Those recommendations, in some cases, may further limit the ability to completely recover the amounts spent in the proceedings.

PRODUCT LIABILITY LAW IN THE UNITED KINGDOM

Product liability law in England and Wales¹ derives from two sources: European Union treaties, directives, and regulations, on the one hand, and domestic legislation and common-law principles, on the other.

Four Council Directives, which are relevant to issues of product liability, have been implemented in the United Kingdom (“U.K.”):

- Council Directive 85/374/EEC of July 25, 1985, on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (the “Product Liability Directive” or the “Directive”), implemented by Part I of the Consumer Protection Act 1987 as modified by the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000 (together, the “CPA”);
- Council Directive 2001/95/EEC of December 3, 2001, on general product safety, implemented by the General Product Safety Regulations 2005 (the “GPSD”);
- Council Directive 2005/29/EEC concerning unfair business-to-consumer commercial practices in the internal market, implemented by the Consumer Protection from Unfair Trading Regulations 2008 (the “CPUTR”); and
- Council Directive 92/13/EEC on unfair terms in consumer contracts, implemented by the Unfair Terms in Consumer Contract Regulations 1999 (the “UTCCR”).

Thus, to a significant extent, the principles of product liability under English law² are similar to those in other European countries.

Civil product liability claims are usually brought under the strict liability regime of Part I of the Consumer Protection Act. Subject to statutory defenses, a manufacturer (including a component or raw material supplier) is liable to pay compensatory damages to persons who suffer personal injury or damage to their noncommercial property as a result of the product not being as safe as people generally are entitled to expect. Importers to England from outside the EU and “own branders” are also subject to this obligation, but other distributors and sellers will be held liable only if they fail to comply with a request to identify the producer or their own immediate supplier.

Pursuant to a claim in the tort of negligence, a manufacturer, distributor, or seller may be found liable to pay compensatory or (exceptionally) exemplary or

punitive damages to an end user of a product who suffers personal injury or damage to property (other than to the product itself) as a result of the defendant’s failure to take reasonable care.

Manufacturers, distributors, and sellers may also face contractual liability for any defective product that they supply, pursuant to which damages to recover lost profits may be claimed. Terms as to the quality and suitability of the product supplied are implied into contracts of sale by statute. Purported exclusions or limitations of liability will be valid only in certain circumstances, such as to the extent reasonable. The exclusion or restriction of liability for death or personal injury caused by negligence is prohibited.

1 The legal system of England and Wales is separate from that of Scotland, which is again separate from that of Northern Ireland, although in practice, statute-based (and, as here, EU-derived) law is often identical in all three systems. There is therefore no such thing as United Kingdom law, but references here to the United Kingdom refer to statutes in force in all three legal jurisdictions. The Republic of Ireland is, of course, an entirely separate country from the United Kingdom.

2 For simplicity, we adopt the phrase “English law” to refer to the law of England and Wales.

Criminal sanctions are most likely to apply to manufacturers, distributors, and sellers of defective products relating to conduct that: (i) causes death or personal injury to people; (ii) misleads the consumer; or (iii) creates an unacceptable risk as regards a product's safety.

Manufacturers and distributors are under obligations to alleviate risk to consumers, including to recall products in certain circumstances. Local government authorities have wide-ranging statutory powers of investigation and enforcement in relation to dangerous products, including suspension of sales, recall, and forfeiture. Contravention of government product safety orders is a criminal offense.

LIABILITY OF MANUFACTURERS

CIVIL LIABILITY

Strict Liability

Part I of the CPA, which came into force on March 1, 1988, introduced the concept of strict liability for defective products. Prior to this time, civil liability was limited to negligent or deliberate conduct or inaction.

Broadly speaking, strict liability under the CPA applies where harm is caused wholly or partly by a defect in a product.³ The CPA definition of "product"⁴ is broad, comprising any goods⁵ or electricity and including component parts and raw materials. Liability applies to producers⁶ of the product.

A central tenet of Part I of the CPA is that, unlike in a common-law claim in negligence, a claimant need not prove the defendant's fault. Subject to the statutory defenses, it is sufficient to prove that the product contained a defect that caused injury or damage. It is necessary, though, to prove a defect. It is insufficient to show that the product failed and caused damage,⁷ though proof of defect may be shown by inference.⁸ The burden of proof lies with the claimant.

A "defect" is present where "the safety of the product is not such as persons generally are entitled to expect,"⁹ taking into account all the circumstances, including (but not limited to): (i) the manner and purposes for which the product was presented; (ii) what might reasonably be expected to be done with the product; and (iii) the time when the product was put into circulation.¹⁰ A defect shall not be inferred from the fact that a later product is safer. Also, there is authority that a claimant is precluded from arguing that safety features developed subsequently could and should have been introduced earlier.¹¹ Finally, although this does not necessarily apply in other Member States, there is authority that, when considering "all the circumstances," it is inappropriate to take account of: (i) the practicality and cost of possible measures to avoid the defect; or (ii) the social benefits of the product as compared to its risks.¹²

Design and manufacturing defects. The CPA draws no distinction between a design defect and a manufacturing defect.¹³ The appropriate test of "defect" in all cases is the public's legitimate expectation of safety. In applying this test, the courts have referred to a distinction between "standard" and "nonstandard" (in the sense of being "rogue") products, which is somewhat analogous to the traditional U.S. distinction between design and manufacturing defects.

The test for determining whether dangers inherent in a "standard" product fall within the CPA definition of "defect" is to ask: "Can the public have a legitimate expectation of a greater degree of safety from the product?" The fact that the danger inherent in a product is generally known is taken into account in determining the public's legitimate expectation.¹⁴ A product is not to be considered defective for the sole reason that a safer product was subsequently put into circulation.¹⁵

A "nonstandard" product will fall within the CPA definition of "defect" if the claimant is able to demonstrate the non-

3 Section 2(1) of the CPA.

4 Section 1(2) of the CPA.

5 "Goods" include agricultural produce supplied after December 4, 2000 (Council Directive 99/34/EEC and the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000).

6 "Producer" means "(a) the person who manufactured it; (b) in the case of a substance which has not been manufactured but has been won or abstracted, the person who won or abstracted it; (c) in the case of a product which has not been manufactured, won or abstracted but essential characteristics of which are attributable to an industrial or other process having been carried out (for example, in relation to agricultural produce), the person who carried out that process" (Section 1 of the CPA). Products that are "won or abstracted" include minerals and raw materials, such as sea salt, mineral water, coal, and oil.

7 *Richardson v. London Rubber Co Ltd* [2000] Lloyd's Rep. Med. 280.

8 *Ide v. ATB Sales Ltd* [2008] EWCA Civ 424.

9 As might be expected, "safety, in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury" (Section 3 of the CPA).

10 Section 3 of the CPA.

11 *A v. National Blood Authority* [2001] 3 All E.R. 289.

12 *A v. National Blood Authority* [2001] 3 All E.R. 289.

13 An English court has rejected this categorization as alien to the structure of the Directive and the CPA (*A v. National Blood Authority* [2001] 3 All E.R. 289).

14 *A v. National Blood Authority* [2001] 3 All E.R. 289.

15 Section 3(3) of the CPA.

standard nature of the particular product and that it was the nonstandard part which made the product unsafe and caused injury. One caveat is that a particular nonstandard product might not contain a “defect” under the CPA if the public at large accepted¹⁶ that a proportion of the products would be flawed.

Failure to warn. In determining whether the safety of a product is not such as persons generally are entitled to expect, the CPA allows consideration of “any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product.”¹⁷ In practice, despite the strict liability thrust of the CPA, the prevailing view is that the standard with regard to warnings differs little (if at all) from the tort of negligence. The relevant question is: “Was it reasonable to require the producer to provide a warning in the circumstances?” There can be no liability unless the producer knew, or should have known, of the risk of which it failed to warn, and the harm would have been avoided had the producer taken reasonable steps to bring the risk to the user’s attention.

Defenses. There are a number of statutory defenses to a claim under Part I of the CPA:

- The defect is attributable to compliance with a domestic or European Community law requirement.¹⁸
- The defendant did not at any time supply the product to another.¹⁹
- The product was manufactured or supplied for noncommercial purposes.²⁰
- At the time the product was supplied, the defect did not exist in the product.²¹
- The state of scientific and technical knowledge at the time that the product was supplied did not allow discovery or awareness of the defect.²² The wording of this defense is broader than Article 7(e) of the Directive, as well as its application in many Member States:²³ information available to scientific researchers but not producers will not defeat this defense under the CPA, but it would defeat the defense had the wording of the

Directive been adopted. This CPA defense has been narrowly construed. A producer will be protected only if it proves that: (i) the state of scientific and technical knowledge shows that the *possibility* of the defect could not have been discovered, even if there was no means available to determine whether it exists in a particular item;²⁴ and (ii) the relevant scientific and technical knowledge was not available to the producer when the product was marketed, even if a reasonable producer would not have been aware of it or would have dismissed it as contrary to the weight of evidence available at the time.²⁵

- A component manufacturer can show that the defect is wholly attributable to the design of the product in which the component has been fitted or to the instructions given by the product manufacturer.²⁶

Any civil action brought under the CPA is subject to two limitation periods:

- The injured party has three years to initiate legal proceedings for damages from the moment the cause of action accrued or, if later, from the moment he or she acquired, or might reasonably have been expected to acquire, knowledge of the injury or damage;²⁷ and
- The liability of a producer, apparent producer, or importer expires at the end of 10 years from the date that it last supplied the product.²⁸

Damages. Damages are awardable in a successful claim under the CPA for death, personal injury, or any loss of or damage to any noncommercial property (including land).²⁹ The level of damages is to compensate the injured party, not to punish the defendant. Exemplary or punitive damages are therefore not available.

Liability for death or personal injury is unlimited. The U.K. has not implemented Article 16 of the Directive’s optional cap on liability. Liability for damage to noncommercial property is restricted in two ways: (i) there is no liability if the property lost or damaged was not ordinarily intended

16 The relevant test is what the public *actually* accepts rather than what the public is *reasonably entitled* to expect (*A v. National Blood Authority* [2001] 3 All E.R. 289 at paragraph 31).

17 Section 3(1) of the CPA.

18 Section 4(1)(a) of the CPA.

19 Section 4(1)(b) of the CPA.

20 Section 4(1)(c) of the CPA.

21 Section 4(1)(d) of the CPA.

22 Section 4(1)(e) of the CPA.

23 Article 7(e) of the Directive reads as follows: “The producer shall not be liable as a result of this Directive if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered”

24 *A v. National Blood Authority* [2001] 3 All E.R. 289; *Richardson v. London Rubber Co Ltd* [2000] Lloyd’s Rep. Med. 280.

25 *EC Commission v. United Kingdom C-300/95* [1997] ECR 2649.

26 Section 4(1)(f) of the CPA.

27 Section 11A(4) of the Limitation Act 1980.

28 Section 11A(3) of the Limitation Act 1980.

29 Section 5(1) of the CPA.

for private use and intended by the claimant mainly for his or her own private use;³⁰ and (ii) liability is limited to damage caused to property other than to the defective product itself.³¹

Where damage is caused partly by a defect in the product and partly by the fault of the claimant, the damages payable are reduced to such extent as the court thinks just and equitable with regard to the claimant's share in the responsibility for the damage.³²

The Tort of Negligence

Continued relevance in light of the CPA. Despite the CPA's introduction of strict liability for defective products, common-law liability remains. Although a claimant will ordinarily rely on the CPA, in some circumstances he or she will need to rely on the tort of negligence:

- When the damaged property is intended for commercial, rather than private, use;
- If the defective product was never put into circulation; and
- When the three-year limitation period for a property damage claim under Part I of the CPA has expired (the limitation period in the tort of negligence, for all damage other than personal injury,³³ is six years).

The applicable test. A claimant must prove that the manufacturer owed him or her a duty of care, that the manufacturer committed a breach of that duty by failing to take reasonable care, and that this breach was at least a substantial cause of the damage. In addition, the type (but not the extent) of the damage must have been reasonably foreseeable.³⁴ The burden of proof lies with the claimant.

A manufacturer (including a manufacturer of component parts or raw materials) owes a duty of care to the ultimate consumer of its products. In practice, it will often suffice for the consumer claimant to adduce sufficient evidence to justify the inference of the manufacturer's negligence without being required to specify what caused the defect.

Design defect. A design defect arises when a product is unreasonably dangerous when manufactured as intended. Accordingly, a manufacturer is not negligent for a product's design if, at the time of the product's circulation: (i) the manufacturer could not reasonably discover that the design was dangerous or defective; or (ii) according to the

state of technical knowledge and expertise at that time, it was not possible to include safety features in the product, even though they may now be commonplace. Further, a manufacturer will not be liable if the design defect, on the balance of probabilities, is attributable to a third party, such as an external designer or component manufacturer, and the manufacturer exercised reasonable care in selecting the third party and checking his contribution.

Manufacturing defect. A manufacturing defect arises when a particular product differs from the product as intended or desired by the producer.³⁵ A manufacturer will be negligent if the claimant demonstrates that the defect was caused by the manufacturer's failure to take reasonable care during the manufacturing process, but it is not necessary for the claimant to demonstrate precisely how the defect arose.³⁶

Marketing defects and failure to warn. A manufacturer's duty to exercise reasonable care is not limited to the manufacture of the product itself. It also applies to any packaging in which it is distributed, as well as to any labels, instructions, and directions that accompany the product. If a manufacturer knows, or ought to know, about a danger inherent in its product, it is negligent if it fails to take reasonable steps to bring such danger to the consumer's attention.

While, as a general principle, liability will be imposed only if the danger was reasonably discoverable at the time the product was supplied, a manufacturer has a continuing duty to keep up to date with scientific developments relating to its products. If a manufacturer receives, or ought to have received, information of a serious danger, then it has a duty to take reasonable steps to bring such danger to the attention of those likely to be affected. In determining what constitutes "reasonable steps," there is no duty to warn if it would serve no purpose or if the danger is obvious, such as warning that hot drinks are actually hot.³⁷

It is a question of fact and degree in each case whether the manufacturer has given adequate warning. The warning must adequately convey both the likelihood of the risk and the seriousness of the consequences. It would also be prudent, and perhaps required, to warn of any steps that the user could take to avoid or minimize the risk.

30 Section 5(3) of the CPA.

31 Section 5(2) of the CPA.

32 Section 6(4) of the CPA.

33 The limitation period for a personal-injury claim is three years.

34 *The Wagon Mound* [1961] AC 388.

35 *A v. National Blood Authority* [2001] 3 All E.R. 289 at [36].

36 *Grant v. Australian Knitting Mills Ltd* [1936] AC 85.

37 *Bogle v. McDonald's Restaurants Ltd* [2002] EWHC 490 (QB).

Defenses/qualifications. Although not defenses to a claim in negligence, several factual scenarios result in a manufacturer incurring no, or reduced, liability:

- The claimant knows that the product is defective but makes the conscious decision to run the risk and use the product anyway;
- When damage is caused partly by the manufacturer's negligence and partly by the claimant's fault, the damages payable are reduced to such extent as the court thinks just and equitable with regard to the claimant's share in the responsibility for the damage;
- Damage is caused by the claimant's use of the product for an illegitimate purpose or for something substantially different from the manufacturer's intended use; and
- The product causes damage to abnormally sensitive claimants only.

Damages. Damages awarded in a successful negligence claim are generally intended to compensate for any losses incurred by the claimant as a result of the negligently caused defect. Damages are available for death or personal injury caused to the claimant and for damage to his or her property, other than damage to the defective product itself, which is generally not recoverable.³⁸ Purely economic loss caused by the defect is not recoverable.

Although the usual remedy is compensatory damages, exemplary or punitive damages are available in principle when the defendant has shown a deliberate, total disregard for the claimant's rights, coupled with a very high degree of negligence. That said, in practice the courts are reluctant to award exemplary damages.

Liability in Contract

Although contractual liability to product end users is generally a more significant issue for retailers than manufacturers, a manufacturer who sells directly to the consumer in England needs to have regard for contractual protection afforded to consumers. A manufacturer may also face contractual liability for supplying a defective product to its own customers, even if they are not the end users.

Express warranties. Parties to a contract are free to agree to express warranties as they wish, and breach of a warranty will give rise to a claim for damages. Advertising or other promotional language will generally not give rise to an express warranty,³⁹ although a commercial seller of

goods to a buyer who deals as a consumer may be liable for breach of the implied warranty of satisfactory quality (discussed directly below) if the goods lacked a quality claimed for them in "any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative in advertising or labelling."⁴⁰

Implied warranties. Pursuant to the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1983, a number of warranties are implied into the contract of sale of all products supplied in the course of business: (i) the products are of a satisfactory quality;⁴¹ (ii) the products correspond with the description⁴² or sample supplied;⁴³ and (iii) the products are fit for any particular, specified purpose.⁴⁴ The seller will not be liable, however, for faults drawn to the purchaser's attention prior to the contract or which the purchaser's examination of the product should have revealed.

Consumer contracts have an additional presumption: where products show a defect within the first six months after purchase, they are presumed to result from a breach of the warranties implied by statute.

Further warranties are implied into a contract if the parties intended them at the time they entered into the contract or if those warranties are required to give business efficacy to the contract.

Exclusion clauses. A number of restrictions prevent any attempt to exclude or limit liability for defective products:

- The Unfair Contract Terms Act 1977 ("UCTA") prohibits the parties to a consumer contract from excluding the implied term as to the satisfactory quality of the product supplied. UCTA also prohibits the exclusion of liability for death or personal injury caused by negligence, as well as the exclusion of any liability under Part I of the CPA. Other liability for negligence, such as damage to property, may be excluded or limited only to the extent that the exclusion or limitation is reasonable.
- The UTCCR protects consumers against unfair standard terms included in their contracts with retailers by declaring that those terms are not binding.⁴⁵ Unfair terms include those that are misleading, deny the consumer full redress, or exonerate the business from having to perform its obligations.

38 The exception is damage caused to a complex assembled product in which the defective product constitutes only one component.

39 In *Lambert v. Lewis* [1982] A.C. 225, statements in the manufacturer's promotional literature that his product was "foolproof" and "required no maintenance" were held as not intended to be acted on as express warranties.

40 Section 14(2D) of the Sale of Goods Act 1979.

41 Section 14(2) of the Sale of Goods Act 1979 and Sections 4(2) and 9(2) of the Supply of Goods and Services Act 1983.

42 Section 13(1) of the Sale of Goods Act 1979 and Sections 3 and 8 of the Supply of Goods and Services Act 1983.

43 Section 15 of the Sale of Goods Act 1979 and Sections 5 and 10 of the Supply of Goods and Services Act 1983.

44 Section 14(3) of the Sale of Goods Act 1979 and Sections 4(4), 4(5), 9(4), and 9(5) of the Supply of Goods and Services Act 1983.

45 Regulation 8(1) of the UTCCR.

Damages. Whereas in tort the focus is on the protection of the consumer from the danger posed by a defective product, the purpose of contract law in product liability cases is to ensure the quality of the product, that it corresponds with its description, and that it is fit for purpose.

Damages awarded in a breach-of-contract claim are intended to restore the claimant to the position that he or she would have had if the contract had been performed. While damages for death or personal injury are recoverable to the extent that such harm was within the parties' contemplation when they entered into the contract, damages in a breach-of-contract claim are usually awarded for economic loss, such as loss of profits, if that loss was a foreseeable consequence of the breach of contract. Exemplary or punitive damages are not available.

Availability of Class Actions

An extensive debate has taken place in recent years on both the European and the national level as to the availability of aggregate litigation mechanisms. In practice, England remains a long way from prolific class actions for product liability or any other area.

Although the English civil justice system provides for a number of different procedural mechanisms to facilitate multiparty litigation,⁴⁶ in practice these devices have been used sparingly. Because of a growing recognition that existing procedures do not necessarily facilitate justice, the U.K. Civil Justice Council presented a series of recommendations to the government in July 2008, including the introduction of a generic collective action and the possibility of collective claims being brought by a wide range of representative parties, especially designated bodies such as consumer protection groups. While the government did not support this recommendation and instead emphasized regulatory options and alternative dispute resolution, the European Commission has recently concluded a Europe-wide consultation process on collective antitrust damages actions. It continues to work on producing an EU framework on collective redress.

Prohibition of Contingency Fees

Although conditional fee arrangements, including provision for a success fee, are permitted in English civil proceedings, other contingency fees are prohibited.⁴⁷ This prohibition is undoubtedly a significant factor in the small number of class action cases to proceed through the English courts to date. An influential report on costs prepared in December 2009 by a senior member of the English judiciary⁴⁸ recommended that, subject to certain restrictions, lawyers be permitted to charge contingency fees. Whether anything comes of this recommendation remains to be seen.

It remains unlikely that prolific class actions will become a feature of English civil litigation in the near future, although a gradual increase is to be expected.

CRIMINAL LIABILITY

Criminal offenses relating to products fall under three categories:

Conduct That Causes Death or Personal Injury to People

Criminal offenses of this type include all offenses against the person, such as homicide and causing actual bodily harm. With the sole exception of the criminal offense of corporate manslaughter,⁴⁹ which applies to conduct taking place after April 6, 2008, only individuals, not corporate entities, can commit offenses against the person.

Corporate manslaughter is committed when the way in which the company's activities are managed or organized causes a person's death and amounts to a gross breach of a duty of care owed by the company to the deceased (including a duty owed by a company engaged in the supply of goods). Although the role of senior management is crucial in determining whether the company committed this offense, individual directors or managers cannot be convicted of corporate manslaughter. The penalty for corporate manslaughter is an unlimited fine, with the level determined by reference to all the circumstances.

46 These procedures include: (i) the court's power to consolidate any number of claims into a single set of proceedings or to hear two or more claims at the same time (Civil Procedure Rules ("CPR") 3.1(2)(g) and 3.1(2)(h)); (ii) the ability of one named claimant or defendant to bring or defend a civil action both on its own behalf and on behalf of others with the same interest in the claim (CPR 19.6); and (iii) the power for the court to make a group litigation order where there are or are likely to be a number of claims giving rise to common or related issues, pursuant to which the court establishes a register of group litigants to which additional persons may be added even after judgment (CPR 10 Part III).

47 Conditional fee arrangements provide for a fixed percentage uplift on the fees that would have been payable absent a conditional fee arrangement. Fees calculated as a percentage of the amount of damages recovered are not permitted.

48 Lord Justice Jackson's Review of Civil Litigation Costs.

49 This offense was created by the Corporate Manslaughter and Corporate Homicide Act 2007.

Conduct That Misleads the Consumer

The CPUTR prohibits deceptive and other unfair commercial practices. A commercial practice is unfair if it is either a misleading action⁵⁰ or a misleading omission.⁵¹ A person committing the offense is liable for a fine, imprisonment for up to two years, or both.⁵² It is a defense if the misleading action or omission was due to a mistake, accident, act, or default of another person; due reliance on information supplied by another person; or another cause beyond the person's control, *provided that* it took all reasonable care and exercised all due diligence to avoid the offense.⁵³

Conduct That Creates an Unacceptable Risk as Regards a Product's Safety

The purpose of including these offenses is to prevent any harm before it takes place.

The GPSD applies to all products that are not subject to other specific safety requirements imposed by EU law.⁵⁴ The GPSD imposes a general requirement on producers, importers, and other professionals in the supply chain to place only "safe" products on the market.⁵⁵ A product is "safe" if, under normal or reasonably foreseeable conditions of use, it presents either no 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."⁵⁶

The GPSD sets out a number of criminal offenses relating to failure to comply with its general safety requirement, including: (i) the placement on the market of a product that does not conform with its general safety requirement; and (ii) the supply by a distributor of a product that it knows, or should have presumed, to be dangerous.⁵⁷ A GPSD offense can be committed by a corporate entity and, in appropriate circumstances, by individual directors or managers also if it is committed with their consent or connivance or is attributable to any neglect on their part.⁵⁸ An offense under the GPSD may be punished by a fine of up to £20,000, imprisonment for up to 12 months, or both.⁵⁹

The GPSD does not apply to products that are used in the workplace, which are instead covered by the U.K. Health and Safety at Work etc Act 1974. Pursuant to this legislation, suppliers of "articles for use at work" are under a general duty to ensure, so far as is reasonably practicable, that those articles are designed and constructed to be safe and without risk to health when correctly used. Breach of this duty, which applies to manufacturers, designers, importers, equipment rental companies, and installers, is an offense punishable by fines, imprisonment, or both.

LIABILITY OF DISTRIBUTORS, SELLERS, AND RESELLERS

LIMITED CPA LIABILITY

Distributors, sellers, and resellers have limited exposure to strict liability under Part I of the CPA: they face primary liability only if they are "own branders" (those who hold themselves out as producers of a product) or if they import the product into a Member State from a place outside of any Member State in order to supply it in the course of business.⁶⁰ In addition, a supplier of defective products will be exposed to secondary liability under Part I of the CPA if it fails within a reasonable time to comply with a request from an injured person to identify the producer, "own brander," or importer of the product or to identify its immediate supplier.⁶¹

NEGLIGENCE

Distributors, sellers, and resellers owe a duty of care to the end consumer. In order to discharge this duty, a supplier or retailer must take reasonable steps (if any) to examine the safety of the products that it distributes or sells, but only to the extent that an investigation is reasonably possible. For products that cannot reasonably be examined, it is

50 A commercial practice is a misleading action if: (a) it contains false information and is therefore untruthful in relation to characteristics of the product or circumstances connected with its sale, or (b) its overall presentation in any way deceives or is likely to deceive the average consumer, even if the information provided is factually correct, *and* as a result, it causes or is likely to cause the average consumer to make a transactional decision that he or she would not otherwise have made (Regulation 5(2) of the CPUTR).

51 A commercial practice is a misleading omission if it: (a) omits or hides material information, (b) provides material information in a manner that is unclear, unintelligible, ambiguous, or untimely, or (c) fails to identify its commercial intent, *and* as a result, it causes or is likely to cause the average consumer to make a transactional decision that he or she would not otherwise have made (Regulation 6(1) of the CPUTR).

52 Regulation 13 of the CPUTR.

53 Regulation 17 of the GPSD.

54 Separate regulations apply to products such as medicines, cosmetics, medical devices, machinery and electrical devices, toys, and food, each of which imposes its own criminal sanctions.

55 Regulation 5 of the GPSD.

56 Regulation 2 of the GPSD goes on to provide that, in determining what constitutes a "safe" product, one may consider the characteristics of the product; the effect of the product on other products (where it is reasonably foreseeable that it will be used with other products); the presentation of the product (including warnings and instructions for use); and the categories of consumers at risk when using the product.

57 Regulation 20(1) of the GPSD.

58 Regulation 31(2) of the GPSD.

59 Regulation 20(1) of the GPSD.

60 Section 2(2) of the CPA.

61 Section 2(3) of the CPA.

generally sufficient for suppliers to ensure that they are dealing with reputable manufacturers and producers.

Due to their direct contractual relationship with consumers, retailers are more likely than manufacturers to face a contractual claim from a consumer for harm caused by a defective product. English law principles regarding a contractual claim, as explained for manufacturers' liability, apply to retailers.

Criminal liability offenses may also apply to distributors, sellers, and resellers.

LIABILITY OF COMPONENT AND RAW MATERIAL SUPPLIERS

The duties and potential liabilities of component and raw material suppliers mirror those of manufacturers. However, these suppliers are liable only if a defect is found in the component or raw material supplied. The manufacturer of a component has a defense to a claim under Part I of the CPA if it can show that the defect was wholly attributable to the design of the product in which the component was fitted or to the instructions given by the product manufacturer.⁶²

PRODUCT RECALLS AND GOVERNMENT ADMINISTRATIVE INVESTIGATIONS OF PRODUCT DEFECT

STANDARD OF LIABILITY

The GPSD obligates producers and distributors to be informed of the risks of their products. When they learn that a product breaches the general safety requirement and therefore may present consumers with an unacceptable risk, producers and, within the limits of their activities, distributors are required to take appropriate action to alleviate that risk.⁶³ These steps may include a product recall. They must notify the enforcement authority in writing of the action taken to prevent risk to consumers and the identity of all Member States in which, to the best of their

knowledge, the product is being or has been marketed or supplied.⁶⁴

Common-law negligence also imposes a duty on manufacturers and distributors to ensure, as far as is reasonably practical, that their products will not injure the end users. If this duty is breached and injury is caused to the user as a result, the manufacturer or distributor may be liable for damages in a civil action.

The GPSD also provides local government authorities with many powers of investigation and enforcement:

- To organize appropriate checks on the safety of a product;⁶⁵
- To enter, and conduct searches of, premises and to require the supply of information and records by persons carrying on a commercial activity;⁶⁶
- To require the person, at its own expense, to provide warnings as to the risks of a product as stipulated within the notice;⁶⁷
- To serve a suspension notice for the period required to organize appropriate safety checks, where the authority has reasonable grounds for suspecting that a requirement under the GPSD has been contravened;⁶⁸
- To serve a withdrawal notice, prohibiting the person from supplying the product or placing it on the market, where the authority has reasonable grounds for believing that the product is not "safe";⁶⁹
- To serve a recall notice, where the authority has reasonable grounds for believing that a product is not "safe";⁷⁰ and
- To apply to the courts for an order for the *forfeiture* of a product on the grounds that it is not "safe."⁷¹

Any person who: (i) contravenes a safety notice served pursuant to the GPSD; (ii) fails to notify the enforcement authority in writing of any action taken to alleviate unacceptable risk to the consumer; or (iii) obstructs an official in the exercise of his or her powers under the GPSD, commits a *criminal* offense and risks imprisonment for up to 12 months, a fine of up to £20,000, or both.⁷²

62 Section 4(1)(f) of the CPA.

63 Regulations 7 and 8 of the GPSD.

64 Regulation 9(1) of the GPSD.

65 Regulation 21 of the GPSD.

66 Regulation 22 of the GPSD.

67 Regulation 13 of the GPSD.

68 Regulation 11 of the GPSD.

69 Regulation 14 of the GPSD.

70 Regulation 15 of the GPSD.

71 Regulations 18 and 19 of the GPSD.

72 Regulations 20 and 24 of the GPSD.

PROCEDURE

The GPSD is intended to be collaborative. The authorities are required whenever feasible to provide the entity on whom a notice is to be served the opportunity to submit its views before service of the notice.⁷³

The recipient of a notice and, other than in relation to a recall notice, any person with an interest in the relevant product have a right of appeal to the courts for an order to vary or set aside the notice.⁷⁴ Equally, any person aggrieved by an order for the forfeiture of a product may appeal that decision to a higher court.⁷⁵

DEFENSES

It is a defense for a producer to show that it took all reasonable steps and exercised all due diligence to avoid committing the offense.⁷⁶

PRACTICAL ADVICE

DISCOVERY (PARTICULARLY PRETRIAL)

Discovery rules in English civil proceedings differ from those in U.S. civil proceedings. There is no entitlement to pretrial discovery, and wide-ranging requests for discovery of broad categories of documents (“fishing expeditions” and “trains of inquiry”) are not permitted. Rather, a party’s discovery obligations in civil proceedings, which arise after service of proceedings, are to produce all documents on which it relies as well as those in its possession or control that adversely affect its own case, adversely affect another party’s case, or assist another party’s case.⁷⁷ As in the United States, a company’s document retention policy should be suspended when litigation threatens in order to meet these discovery obligations.

THE ATTORNEY-CLIENT PRIVILEGE

A litigant may be able to withhold disclosure of documentation if it can maintain a claim that the documentation is privileged. The legal professional privilege includes: (i) the legal advice privilege; and (ii) the litigation privilege. The legal advice privilege attaches to confidential communications between a lawyer and his or her client (but not third parties) that are for the purpose of giving or receiving legal advice, with respect to the client’s legal rights and obligations. The legal advice privilege extends to advice given by in-house lawyers.

The litigation privilege arises once litigation becomes a reasonable prospect. A privilege then attaches to any communication (including those generated by a third party) that is made at the request of a lawyer, or at the request of a client who intends to pass the communication on to the lawyer, provided that the predominant purpose is for use in connection with the litigation.

The protection afforded by the attorney-client privilege in many European jurisdictions is less extensive than in England. In particular, in some jurisdictions, the legal advice privilege does not extend to in-house lawyers. Businesses that operate across Europe, or whose products are sold in mainland Europe as well as in the U.K., should therefore pay particular heed to the attorney-client privilege rules of each jurisdiction.

INSURANCE

If English law governs product liability insurance policies, the insured will need to be careful to comply with their terms and conditions, as English law generally favors the insurer’s interests. For example, many policies contain restrictive terms as to the timing of notification of claims. Failure to comply with the notice requirement can result in loss of the right to indemnity even if delay has not caused loss to the insurer. Consulting with brokers and lawyers at the time that the policies are negotiated can sometimes allow the insured to avoid some restrictive provisions. English law does permit insurance to cover punitive damages awards in the United States.

73 Regulation 16(1) of the GPSD.

74 Regulation 17(1) of the GPSD.

75 Regulation 18(7) of the GPSD.

76 Regulation 29(1) of the GPSD.

77 CPR 31.6.

PRODUCT LIABILITY LAW IN AUSTRALIA

Australian product liability law has undergone substantial change in the last two years. The Australian Consumer Law (the “ACL”) went into effect on January 1, 2011, and applies to all corporations that supply goods or services to consumers in Australia. The ACL has replaced 20 existing state and territory laws with one law. The change was part of a range of amendments to the former Trade Practices Act 1974 (Cth) (the “TPA”), which has been renamed the “Australian Competition and Consumer Act 2010 (Cth)” (the “CAC Act”), with the ACL incorporated in Schedule 2.

The ACL includes new procedures aimed at preventing unfair consumer contracts; a new national consumer guarantee regime; and a new national product safety law and enforcement system, which includes new penalties, enforcement powers, and consumer redress options with national application. Other changes introduced (which are not discussed) relate to unsolicited consumer agreements (door-to-door sales and direct marketing) and lay-by agreements.

There are two sources of product liability law in Australia: (i) specific legislative regimes at both the federal and state levels (now including, most importantly, the ACL); and (ii) the common law of contract and tort. This summary will focus on the national regime, but it is important to note that, for corporations looking to supply products in Australia, the evolving and complex nature of the laws in this jurisdiction makes it prudent business practice to seek advice on possible state-based consumer laws as well as any relevant industry-specific consumer laws. This summary will also focus primarily on the common law of negligence as opposed to contract law.

GENERAL LEGISLATIVE FRAMEWORK

The ACL imposes, in effect, strict liability contracts between suppliers, manufacturers, and individuals. Some provisions of the ACL (e.g., consumer guarantees and unfair contracts) are limited in scope to supplies of goods and services to “consumers.” An individual will be deemed to have acquired goods as a consumer if the amount paid for the good or service was less than \$40,000¹ or if the good was of the kind that is ordinarily acquired for personal, domestic, or household use. Whether goods are of the kind ordinarily acquired for personal, domestic, or household use is a question of fact; however, there is some available guidance from precedents in TPA litigation. A person will not be taken to have purchased goods as a consumer if the goods were purchased for the purpose of using or transforming the goods in trade or commerce; for the process of production or manufacture; for repairing or treating other goods or fixtures on land; or for resupply (inventory).

Under the ACL, a “manufacturer” includes any corporation that: (i) grows, extracts, produces, processes, or assembles goods; (ii) holds itself out to the public as the manufacturer of the goods (deemed manufacturer); (iii) uses its own brand name in relation to the goods (deemed manufacturer); (iv) permits another person to promote the goods as goods manufactured by the corporation; or (v) imports goods where the manufacturer does not have a place of business in Australia.² A corporation will be taken to be “supplying” a product under the ACL if it supplies goods by way of sale, exchange, lease, hire, or hire purchase. It will be taken to be supplying a service when it grants or confers the service.³

Both federal consumer regulators (the Australian Competition and Consumer Commission (the “ACCC”)) and state consumer regulators enforce the ACL. These regulators are parties to a memorandum of understanding, which explains the way in which they will work together to administer and enforce the ACL. Interestingly, the New

1 All amounts in this chapter are expressed in Australian dollars.

2 CAC Act s7.

3 CAC Act s2.

Zealand Ministry of Consumer Affairs and the New Zealand Commerce Commission have also signed the memorandum of understanding.

Cases brought under the ACL will be heard before the Federal Court, and cases brought under state legislation will be heard before the appropriate state court (usually the supreme court). Trials are usually before a judge, and in some courts juries are not permitted for these cases. Trials can take six months to several years, although the Federal Court usually moves faster than the state courts. In both the Federal Court and the state supreme courts, there are rights of appeal all the way to the High Court.

CIVIL LIABILITY OF MANUFACTURERS FOR DEFECTIVE GOODS

THE ACL

Under Part 3-5 of the ACL, individuals have a range of statutory causes of action that are similar to actions in tort. A contract cannot exclude the application of this part of the ACL, and any attempt to exclude will be held void (s150). This part of the ACL applies to all supplies of goods by a manufacturer to individuals (in trade and commerce), not just supplies to consumers. In addition, the ACL allows the regulator to commence an action on behalf of individuals, provided that the regulator has the individuals' written consent (s149).

Generally, the elements that need to be proved to make a successful claim against a manufacturer for a defective product under the ACL are as follows:

- The defendant must be the manufacturer or deemed manufacturer of the goods;
- The defendant must have supplied the goods in trade or commerce;
- The goods must have had a "safety defect" under the ACL; and
- The plaintiff must have suffered loss or damage due to the safety defect.

Goods are said to have a safety defect if their safety is not such as persons generally are entitled to expect. When determining the safety of goods, the circumstances to be considered include:

- The manner in which, and purposes for which, they have been marketed;
- The packaging used;
- The use of any mark in relation to the goods;

- Any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the goods;
- What might reasonably be expected to be done with or in relation to the goods; and
- The time when they were supplied by their manufacturer.

The ACL specifies that it should not be automatically inferred that goods are unsafe where a manufacturer supplies safer goods at a later date, or where goods are made in accordance with a Commonwealth mandatory standard which is not the safest possible standard in light of scientific or technical knowledge.

Section 142 sets forth defenses available to manufacturers in actions brought under the ACL:

- The safety defect did not exist at the time when their actual manufacturer supplied the goods;
- The safety defect was due solely to compliance with a mandatory standard (raising this defense results in a requirement to notify the Commonwealth and will result in the Commonwealth becoming a defendant to the action; if the defense is successful, the Commonwealth will be liable);
- The scientific and technical knowledge available at the time did not enable discovery of the safety defect; or
- For components, the safety defect is attributable only to the design of other components, the markings of other components or the finished product, or the instructions or warnings given by the manufacturer of the other components or the finished product.

Generally, individuals must commence an action within three years of when they ought to have been aware of the loss or damage, the safety defect, and the identity of the manufacturer. In addition, there is a general limitation on actions brought more than 10 years after the manufacture of the goods.

A successful claimant is entitled to recover the amount of the loss or damage suffered. The ACL has specific provisions for personal injuries (s138); third-party injuries (s139); damage to personal items (s140); and damage to land, buildings, and fixtures used for private use (s141).

COMMON LAW OF NEGLIGENCE

Although the preferred option for common-law product liability actions is a breach-of-contract claim,⁴ individuals may also make product liability claims under the common law of negligence. Individuals may claim for loss or damage caused by negligence in the manufacture, design,

4 A contract claim is preferred primarily because recovery for pure economic loss is more difficult in tort than in contract, and the plaintiff is required to prove the defendant's fault. For further discussion, see LexisNexis Butterworths, *Halsbury's Laws of Australia*, Vol. 13, 338 Product Liability, "Negligence" [338-15].

or formulation of a product⁵ or negligence in product information.⁶ Previous negligence claims have extended to a wide range of products, including, but not limited to, water, gas, food and drink, clothing, industrial equipment, and components.⁷

The primary advantage of pursuing a claim in negligence instead of contract is that the plaintiff does not need to establish privity of contract with the defendant. This may be desirable when the intention is to sue a manufacturer instead of a retailer. The plaintiff is typically required to identify the manufacturer of the defective product or component in question. The federal and state/territory rules of court that would apply to a negligence action allow plaintiffs to obtain information about prospective defendants (e.g., a manufacturer) from third parties (e.g., a supplier).

For a successful negligence claim, the plaintiff must prove four elements:

- **The existence of a duty of care.** Australian law has followed English law. A duty of care arises when it is reasonably foreseeable that a defendant's negligent act could harm the plaintiff.⁸ In Australia, the product manufacturer owes a duty of care resulting from a sale of Australian goods. However, the individual facts of a claim may impose a duty on others in the distribution chain, such as distributors, designers, or retailers. Manufacturers will generally be found to have a duty of care where they intend for goods to reach the consumer in the form in which they left the manufacturer, with no reasonable possibility of intermediate examination.⁹ A manufacturer will not have a duty of care where the risk was obvious and unavoidable and it has done all that a reasonable person would do to prevent or mitigate this risk¹⁰ or where the risk was not reasonably foreseeable.¹¹
- **Breach of duty of care.** The claimant needs to show the defendant's breach of a duty owed to the plaintiff.¹² The court will consider the magnitude of the risk of the event that caused the loss or damage and the probability of the event's occurrence. These factors will be balanced against the expense, difficulty, and inconvenience of reducing the risks¹³ based on the standard of conduct exercised by a "reasonably prudent manufacturer."¹⁴ Manufacturers may also breach their duty if they supply a product without sufficient or correct information, appropriate warnings,¹⁵ or instructions about its proper use.
- **Foreseeable loss or damage.** Loss or damage can include personal injury¹⁶ (including psychiatric injury¹⁷) and damage to property.¹⁸ In certain circumstances, pure economic loss can be recoverable.¹⁹ The plaintiff is not required to show that the precise loss or damage was foreseeable; rather, the plaintiff only needs to show that some loss or damage was foreseeable in the event of a breach of the duty of care. Loss or damage will be foreseeable where a product is used in the manner contemplated by the defendant and loss or damage occurs.²⁰
- **Causation.** The loss or damage must be linked, by causation, to the defendant's fault (breach of duty).²¹ The test is the "but for" test, meaning that the claimant would not have suffered harm but for the defendant's negligence. However, commentators acknowledge that this is not the sole test to demonstrate a causal link. Commentators have suggested that causation is a question of fact not able to be reduced to a formulaic approach (such as applying a "but for" test); rather, the issue is to be resolved as a matter of common sense and experience.²² However, after the Tort Reform Process (a series of reforms in 2002, following a review

5 LexisNexis Butterworths, *Halsbury's Laws of Australia*, Vol. 13, 338 Product Liability, "Negligence" [338-15]; *Donoghue v. Stevenson* [1932] AC 562; *Grant v. Australian Knitting Mills Ltd (Woollen Underwear Case)* (1935) 54 CLR 49.

6 *Bryden v. Chief General Manager of the Health Department* (1987) Aust Torts Reports 80-075.

7 LexisNexis Butterworths, *Halsbury's Laws of Australia*, Vol. 13, 338 Product Liability, "Negligence" [338-75].

8 *Sydney City Council v. Dell'Oro* (1974) 132 CLR 97, applying the rule approved by the Privy Council in *Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd (The Wagon Mound (No. 1))* [1961] AC 388 at 425; see R.P. Balkin & J.L.R. Davis, *Law of Torts*, Third Edition, LexisNexis Butterworths, 2004, paragraph [7.15].

9 LexisNexis Butterworths, *Halsbury's Laws of Australia*, Vol. 13, 338 Product Liability, "Negligence" [338-25].

10 *Chicco v. The Corporation of the City of Woodville* (1990) Aust Torts Reports 81-028. This case involved an injury caused by the misuse of playground equipment (a "flying fox," or small-scale zip-line). Please note that in *Todman v. Victa Ltd* [1982] VR 849, the court said in relation to a lawn mower that it "serves no purpose to classify such a machine as dangerous in itself. The question is whether the machine has been designed and constructed with a degree of care appropriate to the dangers to minimize the risks." The court continued, "[W]here a duty of care is owed . . . the standard of care demanded rises with the gravity of the risks which negligence can create."

11 *H v. Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-100 SC(NSW).

12 *Donoghue v. Stevenson* [1932] AC 562; [1932] SC (HL) 31.

13 *Wyong Shire Council v. Shirt* (1980) 146 CLR 40.

14 *Blyth v. Co of Properties of the Birmingham Waterworks* (1856) 11 Exch 781.

15 *O'Dwyer v. Leo Buring Pty Ltd* [1966] WAR 67.

16 *Donoghue v. Stevenson* [1932] AC 562.

17 *Vince v. Cripps Bakery Pty Ltd* (1984) Aust Torts Reports 80-668, SC(TAS).

18 *Grant v. Cooper, McDougall and Robertson Ltd* [1940] NZLR 947.

19 *Caltex Oil (Aust) Pty Ltd v. The Dredge Willemstad* (1976) 136 CLR 529.

20 *O'Dwyer v. Leo Buring Pty Ltd* [1966] WAR 67. A plaintiff was allowed to recover damages for an injury caused by the plastic stopper of a bottle of sparkling wine whose label did not warn about the risk that the stopper might eject spontaneously.

21 R.P. Balkin & J.L.R. Davis, *Law of Torts*, Third Edition, LexisNexis Butterworths, 2004, paragraph [9.1].

22 R.P. Balkin & J.L.R. Davis, *Law of Torts*, Third Edition, LexisNexis Butterworths, 2004, paragraph [9.6].

of Australian negligence law), two main aspects appear to be critical to proving causation: (i) the defendant's negligence was a necessary condition of the occurrence of the harm; and (ii) the scope of the defendant's liability extends to the harm caused.

A claim must be brought within the relevant jurisdiction. The size of the claim determines the appropriate court. Negligence claims are subject to the limitation periods applicable in the jurisdiction.

A manufacturer has several defenses to a claim of negligence. These defenses include:

- **Voluntary assumption of risk.** The defendant is required to prove that the claimant perceived the existence of a danger and fully appreciated it but nonetheless voluntarily accepted the risk. This absolute defense bars liability and will be determined by a factual examination of the claimant's conduct.
- **Misuse of the product.** The defendant must show that the claimant engaged in unauthorized use. This absolute defense turns on an objective test of what constitutes appropriate use to the reasonable user.
- **Contributory negligence.** This absolute defense at common law has been modified by apportionment legislation in all jurisdictions.²³ If a defendant can show that the claimant did not meet the standard of care required for his or her own protection and safety, and this conduct contributed to the loss or damage, the defendant's liability will be reduced commensurately.
- **Scientific knowledge.** A manufacturer can prove that it carried out appropriate research, testing, or investigation prior to supply and that the defect was not known or discoverable at the time.²⁴
- **Additional defenses.** Australian tort reform has introduced statutory defenses to claims for negligence. Although the defenses differ in each jurisdiction, they mirror many common-law defenses. Examples of defenses in New South Wales²⁵ include harm caused by an unavoidable, inherent risk; that the defendant was a volunteer and acted with reasonable care and skill; and, in some circumstances, that the defendant was a public or quasi-public authority.²⁶

The court will generally award monetary compensation as a remedy for negligence. The damages available for bodily injury include general damages for pain and suffering, loss of amenities, and loss of expectation of life, along with special damages for loss of wages, medical and hospital expenses, and the like. Damages are available for diagnosed psychiatric conditions as well.

The court also has jurisdiction to award exemplary or punitive damages. However, the Tort Reform Process has resulted in a number of caps on this type of damages.

LIABILITY OF DISTRIBUTORS, SELLERS, AND RETAILERS

In actions commenced for loss or damage from defective goods, distributors, sellers, and retailers will generally not be liable, although they may be liable where their activities make them deemed manufacturers. They can also become liable where an individual commences an action against a manufacturer for the supply of defective goods but does not know the manufacturer's identity. The claimant can request this information from a supplier, and if the supplier does not inform the claimant within 30 days, the supplier will be taken to be the manufacturer for the purposes of the action (s147).

Distributors²⁷ and retailers²⁸ can be liable in negligence, provided that the claimant can show that they owed the claimant a duty of care. No Australian authority requires retailers, sellers, or distributors to test products. However, authorities suggest that manufacturers may have an arguable defense to liability where they reasonably anticipated that the distributor or supplier would carry out an intermediate examination of the product which would reveal any defects²⁹ and where it was reasonable for them to rely on this examination as an adequate safeguard.³⁰

Some manufacturers may be able to use the learned-intermediary defense in common-law claims of negligence, although Australian courts have yet to examine this point. The concept of the learned intermediary in Australia is similar to the concept as applied in the U.S. This defense applies where the distributor, seller, or retailer is a person who has the requisite skill or knowledge (e.g., medical

23 LexisNexis Butterworths, *Halsbury's Laws of Australia*, Vol. 13, 338 Product Liability, "Negligence" [338-95].

24 *E v. Australian Red Cross Society* (1991) 31 FCR 299 at 325–30.

25 *Civil Liability Act 2002* (NSW).

26 "Public or other authority" refers to the Crown, government departments, public health organizations (e.g., public hospitals), local councils, public or local authorities (constituted by or under legislation), persons having public official functions (or persons who are not public officials but were exercising those functions), or persons or bodies who conduct nongovernment schools. See Section 41 *Civil Liability Act 2002* (NSW) and Section 4 *Civil Liability Regulation 2009* (NSW).

27 *Parker v. Oloxo Ltd* [1937] 3 All E.R. 524.

28 *Fisher v. Harrods Ltd* [1966] 1 Lloyd's Rep 500.

29 *Herschtal v. Stewart and Ardern Ltd* [1940] 1 KN 155.

30 *Jull v. Wilson & Horton* [1968] NZLR 88.

practitioners³¹ or hairdressers with hair products³²) and receives from the manufacturer adequate information about the potential risks, in the expectation that the distributor will pass this information on to the consumer.

LIABILITY OF COMPONENT AND RAW MATERIAL SUPPLIERS

Under the statutory ACL regime, component and raw material suppliers may be liable if they fall within the definition of “manufacturer”; one would have to examine the individual circumstances of the particular production network to determine whether this is the case. Section 7 of the ACL defines “manufacturer” broadly; the term includes growers, processors, assemblers, and importers of goods. Component and raw material suppliers have defenses where they can show that the defect is not attributable to their components or raw materials.

Under common-law negligence, a supplier of raw materials or components can be held liable for loss or damage caused by its breach of a duty of care.³³ If a component causes a product defect, the manufacturer of the finished product will not be held vicariously liable, provided that the supplier is not the manufacturer’s servant, the manufacturer did not authorize the supplier’s negligent act or omission, and the manufacturer had satisfied itself that the supplier was reputable.³⁴

If the manufacturer of the finished product is found to be liable, then it may generally recover contribution from the component supplier if the component supplier would have been liable for the same damage. The amount of contribution recoverable is what the court finds to be just and equitable with regard to the extent of the supplier’s responsibility for the damage. In most jurisdictions, the court can also order a complete indemnity.

AVAILABILITY OF CLASS ACTIONS

The rules of the Federal Court and the state and territory supreme courts have a variety of procedures available for the grouping of similar claims. An opt-out class action procedure is available to claimants under the Federal Court Act 1976 and the Victorian Supreme Court Act 1986. This procedure is available where seven or more individuals have claims against the same person or corporation which arise out of related circumstances, provided that the claims all give rise to a substantial common issue of law or fact. This procedure is available only where the Federal Court or the Victorian Supreme

Court has original jurisdiction. Under Section 138 of the CAC Act, the Federal Court is granted jurisdiction over any civil matter arising under the ACL. This amendment may result in an increase in Australian product liability class actions because it has expanded the original jurisdiction of the Federal Court over product liability claims. A number of litigation funders provide funding for class actions in Australia.

The ACL also provides a mechanism for the regulator (the ACCC or the equivalent state or territory regulator) to commence actions on behalf of consumers. Section 149 of the ACL states that the regulator may commence an action on behalf of one or more persons identified in an application who have suffered loss or damage because of defective goods. Section 277 of the ACL allows the regulator to commence an action on behalf of consumers against suppliers of goods or services or manufacturers of goods where the goods or services do not comply with the relevant statutory guarantees under Division 1 of Part 3-2. The regulator is entitled to make the application only if it has the written consent of the consumers on whose behalf the application is made.

SAFETY STANDARDS AND PRODUCT RECALLS

The ACL has introduced national consumer safety laws. They provide a consistent national approach to making safety standards for consumer goods and product-related services. Under the new regime, the Australian government may regulate product safety by issuing safety warning notices, issuing product bans (both interim and permanent), imposing mandatory safety standards, or by issuing compulsory recall notices.

Information Requirements

Part 3-4 of the ACL allows the Commonwealth Minister to make information standards (or declare existing standards to be national standards (s135)) for goods and services by publication of a written notice on the internet (s134). Information standards require corporations to provide certain information when supplying goods or services (usually through labeling). The standard may also set out the appropriate form for, or manner of conveying, the information. Information standards are particularly important for clothing, cosmetics, and tobacco. It is a corporation’s obligation to ensure that it is familiar and compliant with the standards. Failure to comply with these standards can result in a pecuniary penalty of \$1.1 million but is not a criminal offense under Chapter 4 of the ACL.

31 *H v. Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000, SC(NSW).

32 *Holmes v. Ashford* [1950] 2 All E.R. 76.

33 *Read v. Croydon Corporation* [1938] 4 All E.R. 631.

34 *Peake v. Steriline Manufacturing Pty Ltd* (1988) Aust Torts Reports 80-154, SC(VIC).

Safety Requirements

The ACL grants the Commonwealth Minister the power to impose new mandatory safety standards (s104) and to declare existing safety standards to be national standards (s105). A safety standard can set out requirements for the product's manufacture, operation, design, contents, testing, warnings, and instructions (s104(2)). The onus is on the supplier to ensure that its consumer goods comply with the relevant safety standards.

Again, a corporation that supplies goods or services that do not comply with a safety standard can be liable for a penalty of \$1.1 million. Violation is a criminal offense under Chapter 4 of the ACL, meaning that further fines may be assessed and a conviction recorded.

If a safety standard sets out two or more ways of complying with its requirements, a corporation is required to notify the regulator of the method that it will use (s108). Failure to notify is an offense and can result in a fine of \$22,000.

Other mechanisms open to the regulators are:

- **Safety warning notices.** These formal notices inform consumers and suppliers about goods or product-related services that may cause injury and are under investigation. They do not necessarily prevent a product from being supplied; rather, they explain that the government is investigating products to determine whether their use in a "reasonably foreseeable" way could injure someone, and the notices may warn of possible risks of use.
- **Product bans.** Both the Commonwealth and the state ministers can impose an interim ban of 60 days (with a possible 30-day extension) where a product may cause injury, its use (or foreseeable misuse) will cause injury, or it has been banned in another jurisdiction (s109). Only the Commonwealth Minister may impose a permanent ban on a product (s114). Depending on the nature of the ban and the level of imminent danger to the public from the use (or foreseeable misuse) of the product, the Minister may be required to call a conference with the corporation and the regulator before imposing the ban. State and territory ministers do not have to call a conference before imposing an interim ban. Failure to comply with these bans can result in a pecuniary penalty of \$1.1 million and is a criminal offense under Chapter 4 of the ACL.

Product Recalls

Approximately 435 recalls have taken place per annum in Australia over the last 20 years.³⁵ Although no agency has ever undertaken a full audit of the nature and effectiveness of these recalls, it is believed that mandatory recalls are "rare,"³⁶ and product-return rates in excess of 10 percent are regarded as "very successful."³⁷

Voluntary recalls. There is a general expectation that a supplier will recall goods when it becomes apparent that its goods may cause injury, do not comply with a safety standard, or are banned. It is in a supplier's best interest to initiate a voluntary recall to prevent possible statutory, criminal, or common-law claims. When a supplier voluntarily recalls a product, it must notify the Commonwealth Minister within 48 hours of recalling the goods (s128). In addition, the supplier needs to give notice to all persons supplied outside Australia and provide the Commonwealth with a copy of the notice within 10 days (s128(4)). Failure to comply may result in a fine of \$16,650.

Compulsory recalls. Commonwealth or state and territory ministers may order compulsory recalls if they believe that a product may injure someone through its foreseeable use, does not comply with a safety standard, or is subject to an interim or permanent ban (s122). Once a notice is published, the supplier is required to provide all persons outside Australia who have been supplied with the product a copy of this notice as soon as practicable (s125). Compulsory-recall notices will also require the supplier to replace, repair (if this is appropriate), or refund the purchase price (s124). Failure to comply with a compulsory-recall notice can result in a \$1.1 million penalty, and failure to notify overseas consumers can result in a \$16,650 fine and is a criminal offense under Chapter 4 of the ACL. Because compulsory recalls are rare, there is limited guidance on their operation. The majority of recalls in Australia are initiated voluntarily by suppliers.

The procedure to contest a compulsory-recall order before it is brought into effect involves requesting a conference with the ACCC to discuss the order. This procedure may not be available if the products create an imminent risk of death, serious illness, or serious injury. The ACCC's determination is subject to the review mechanisms available under Australian administrative law.

35 Australian Competition & Consumer Commission, "Review of the Australian Product Safety Recalls System," 2010 at 1.

36 Productivity Commission, "Review of the Australian Consumer Product Safety System—Discussion Draft," 2005.

37 New South Wales Office of Fair Trading, "Submission to Productivity Commission," 2005.

Mandatory Reporting

The ACL obligates suppliers to report to the ACCC (within two days) any incidents of which they have become aware in the ordinary course of business where death, serious injury, or illness was caused or may have been caused by the use (or foreseeable misuse) of their products (s131 and s132). The report does not need to be substantiated prior to filing, and investigations may continue. The report is not an admission of liability (s131(6) and s132(6)). The information will also be treated confidentially, subject to required information sharing between ministers and regulators or any disclosure that is necessary in the public interest or is otherwise authorized under law (s132A). Failure to report can result in a pecuniary penalty of up to \$16,650 and is a criminal offense under Chapter 4 of the ACL. The obligation to report does not require a defect to be present in the goods; rather, the obligation arises where the supplier (or a person other than the supplier) forms the view that the death, serious injury, or illness was caused or may have been caused by the use (or foreseeable misuse) of the goods.

FRAUD AND DECEPTIVE CONDUCT

Section 18 of the ACL (formerly Section 52 of the TPA) prohibits corporations from engaging in trade or commerce in a manner that is “misleading and deceptive.” This provision is especially important to corporations’ marketing activities. Where a corporation is found to have engaged in “misleading or deceptive” conduct, civil remedies include injunctions, declarations, damages, compensatory orders, orders for nonparty consumers,³⁸ and nonpunitive orders.³⁹ Fines and criminal sanctions do not apply to such behavior, but there may be penalties if the conduct breaches other provisions of the ACL providing for penalties.

Section 29 of the ACL prohibits false or misleading misrepresentations made in connection with the supply of goods or services. Chapter 3 of the ACL describes unfair practices that may result in a pecuniary penalty and are generally criminal offenses under Chapter 4. These include, but are not limited to, making false or misleading representations about:

- A product’s quality, value, grade, composition, style, or model;
- A requirement to pay for a contractual right that is wholly or partly equivalent to a warranty, guarantee, right, or

remedy provided by law (this has potential to impact extended warranties offered by suppliers);

- The age of the goods;
- Testimonials; and
- A person’s agreement to purchase a good.

A breach of this section can result in a pecuniary penalty of \$1.1 million and is a criminal offense under Chapter 4.

Under the common law, consumers may pursue claims in the tort of deceit or negligent misrepresentation. However, because of the difficult standards of proof required for these actions, these common-law claims are not pursued as often as statutory claims.

CONSUMER GUARANTEES

The ACL introduces a single set of consumer guarantees that replace the TPA’s regime of implied warranties and conditions. This new regime grants consumers enforceable statutory rights. Previously, failures to comply with the implied warranties and conditions were enforceable as a breach of contract.

The ACL’s guarantees apply only to goods and services supplied to “consumers.” Therefore, they apply only to transactions for “consumer” goods as defined in the ACL. Goods sold by private sellers at one-off sales (e.g., garage sales) are excluded, as well as goods sold at auction where the auctioneer is the owner’s agent. In addition, because these guarantees apply between the supplier and the consumer, they apply to retailers, distributors, and sellers whose activities meet the definition of “supplying” in the ACL.

The consumer guarantees include:

- **Title.** The supplier has the right to sell the goods;
- **Undisturbed possession.** The supplier guarantees that no one will try to repossess or take back the goods;
- **Unencumbered.** Goods are and will remain free from any hidden securities or charges;
- **Quality, care, and skill.** The goods are of acceptable quality or the services are carried out with reasonable care and skill;
- **Description.** The goods match their descriptions (or will match any samples or demonstration models);
- **Purpose.** The goods are fit for any purpose that the consumer makes known to the supplier;

38 Under Section 239 of the ACL, if a corporation engages in conduct that contravenes either Chapter 2, Part 3-1, Division 2, 3, or 4 of Part 3-2 or Chapter 4 of the ACL and is likely to cause a class of persons to suffer loss or damage and this class includes persons who are nonparty consumers (i.e., any person who is not, or has not been, a party to an enforcement proceeding in relation to the conduct), a court may on the application of the regulator make orders (other than an award of damages) against the corporation as the court thinks appropriate. The order must be an order that the court considers will redress, prevent, or reduce the loss or damage suffered by nonparty consumers.

39 Under Section 246 of the ACL, when a corporation engages or is involved in conduct that contravenes Chapter 2, 3, or 4 of the ACL, the court is granted wide discretion to make nonpunitive orders against the corporation, such as requiring the corporation to perform services, take preventive measures, or disclose or publish certain information. Examples include the implementation of compliance programs, the implementation of education programs for employees, and the provision of community awareness programs.

- **Repair.** The repairs and spare parts are reasonably available;
- **Timeliness.** Services are carried out within a reasonable time; and
- **Express warranty.** The manufacturer will comply with express warranties.

Suppliers are not entitled to:

- Limit, restrict, or exclude consumer guarantees (s64);
- Avoid their obligations by getting the consumer to agree that the law of another country applies to the contract or to any dispute;
- Charge a consumer for rights equivalent to those granted under the guarantees regime; or
- Limit their liability to less than an obligation to replace or repair the goods (s64A).

Suppliers need to be aware that “no refund” signs are now unlawful. In addition, offers of extended warranties need to be examined to ensure that they are actually offering additional rights and protection above the statutory guarantees.

Where a product does not meet a guarantee, consumers are entitled to enforce their rights, and the supplier will be required to provide an appropriate remedy (s259). For minor problems, the supplier will have a choice between repair, replacement, or refund (s261). For major failures, consumers are entitled to reject the products and can choose between a refund, replacement, or compensation for the depreciated value (s263(4)). A major failure includes circumstances where reasonable consumers would not have purchased the product if they had known about the problem; the product is significantly different from the description, sample, or demonstration model; the product is substantially unfit for its purpose; or the goods or services are unsafe (s260).

A consumer is also entitled to recover damages for his or her loss or damage due to the supplier’s failure to comply with the guarantee if the loss or damage was reasonably foreseeable (s259(4)). Under this division of the ACL, the consumer will usually be required to notify the supplier of his or her complaint and, in the event that the supplier fails to comply with the requirements under the ACL to repair, replace, refund, or compensate the consumer, he or she is entitled to enforce those rights by action against the supplier.

In addition to their rights against suppliers, consumers have rights against manufacturers under the ACL. Under Section 271, a consumer is entitled to take action against a manufacturer (subject to certain defenses outlined in the section) to recover damages for any loss in value and any foreseeable loss or damage if the manufacturer fails

to comply with the guarantees in relation to acceptable quality, description, repairs and spare parts, and express warranties. Depending on the guarantee breached, defenses open to manufacturers include that:

- Another person caused the loss by an act, default, omission, or representation; or
- A cause independent of human control occurred after the goods left the manufacturer’s control.

The acceptable-quality guarantee grants consumers rights where goods are not fit for their purpose; are not free from defects; or are not safe, durable, and acceptable in appearance and finish. One factor when considering whether goods are of acceptable quality is the price of the goods (s54(3)(b)). Under Section 271(2)(c), a consumer will not be able to recover damages from a manufacturer if the only reason the goods are not determined to be of acceptable quality is the fact that the supplier’s price was higher than the price recommended by the manufacturer or the average retail price for the goods.

A supplier retains the right to seek indemnification from the manufacturer for when it pays damages for breaches of consumer guarantees (s274), so long as the breaches relate to the manufacturer’s failure to comply with the requirements in relation to quality, fitness for purpose, or description. The supplier has three years to seek reimbursement from the manufacturer (s274(4)).

Schedule 3 of the Trade Practices (Australian Consumer Law) Amendment Regulations 2010 (No. 1), which came into effect on January 1, 2012, prescribes the form and content of warranties against defects. The requirements include providing appropriate contact details and the procedure for how claims should be made. In addition, the warranty against a defect must state:

Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

UNFAIR CONTRACTS

The ACL prohibits corporations from including “unfair” terms in their standard form contracts for the supply of goods and services to a consumer (an individual whose acquisition of the goods, services, or interest is wholly or predominantly for personal, domestic, or household use or consumption) (s23). The ACL does not define a “standard form contract,” but it generally means a contract

prepared by one party that is not negotiated and is offered on a “take it or leave it” basis. The standard terms and conditions of most consumer products will fall within this meaning. The new requirements do not apply to the terms in such contracts that merely define the subject matter of the agreement, set the upfront price payable under the contract, or are required or expressly permitted by a law of the Commonwealth or a state or territory (s26).

An “unfair” term is one that causes significant imbalance in the parties’ rights and obligations arising under the contract, is not reasonably necessary to protect the supplier’s legitimate interests, and would cause financial or nonfinancial detriment to a party (s24). In determining whether a contract term is unfair, a court will take into account whether the term is transparent (expressed in reasonably plain language, legible, presented clearly, and readily available to any party affected by the term) and how it operates in the contract as a whole (s24). Section 25 of the ACL provides a nonexhaustive list of examples of terms that may be considered unfair in contracts:

- A term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- A term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- A term that penalizes, or has the effect of penalizing, one party (but not another party) for a breach or termination of the contract; and
- A term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning.

The ACCC or a party to a standard form contract can seek a court order to declare a term to be “unfair.” When the court agrees that a term in a consumer standard form contract is unfair, then the ACCC or the Australian Securities and Investments Commission (the “ASIC”) may seek orders for the benefit of other persons where the unfair term has caused or is likely to cause damage to a class of people that includes persons who have not been party to an enforcement action in relation to that unfair term. Courts may order the parties to modify the contract, avoid the term, require refunds or repairs, or prohibit enforcement of the contract.

The common law of contract will also apply to contracts between suppliers and individuals. However, the application of contract law is beyond the scope of this chapter and is of less relevance in light of the ACL and TPA.

CRIMINAL LIABILITY

Corporations (and their officers) can face criminal sanctions under federal or state legislation for defective products. The ACL is administered and enforced jointly by the ACCC (and the ASIC where appropriate) and the state and territory consumer protection agencies. Investigations can be initiated by one of these regulators or can be commenced as a result of market intelligence or complaints by consumers, competitors, or informers.

Chapter 4 of the ACL outlines acts that will constitute criminal offenses and the applicable penalty for each offense. A criminal conviction has a maximum penalty of \$1.1 million for a body corporate; however, additional civil penalties may apply. A prosecution under the ACL must be commenced within three years of the commission of the offense (s212).

Criminal proceedings cannot be commenced against a person for attempt, aiding, inducing, conspiracy, or being an accessory (s217). The regulators have the power to seek information from corporations to identify whether claims (made by individuals) against the corporation are genuine and deserve investigation (failure to comply can result in a public warning notice).

Prior to criminal proceedings, the regulators have a range of alternative mechanisms that they may seek to use, including warnings; disqualification orders; civil pecuniary penalties (required only to prove the breach on the civil standard of balance of probabilities); adverse publicity orders; and court-enforceable undertakings, declarations, and injunctions. Therefore, regulators will tend to use criminal proceedings only in serious cases.

The ACCC has indicated that criminal prosecution is reserved for significant cases where the conduct:

- Warrants action by the regulator in the public interest;
- Is causing significant detriment;
- Affects disadvantaged or vulnerable consumer groups;
- Indicates a pattern of noncompliance, enhancing the risk of future misconduct;
- Relates to a significant new or emerging market issue;
- Is or is likely to become industrywide;
- Has a significant impact on market integrity; or
- Suggests that action by the regulator will have a worthwhile educative or deterrent effect.

A corporation facing prosecution for an offense under Chapter 4 of the ACL has the defenses outlined in the ACL in Part 4-6, including reasonable mistake of fact (s207).

When a corporation becomes aware of the fact that it is being investigated, it should seek appropriate legal advice immediately.

PRACTICAL ADVICE

Pretrial discovery is governed by the rules of the court in whose jurisdiction the proceedings are brought. Discovery in Australia is focused primarily on the litigants' disclosure of documents. Statutory provisions give the word "document" a broad definition; it includes all electronic records commonly used in business. However, courts have a strong preference for litigants' counsel to agree to the parameters of disclosure between themselves, and litigants are encouraged to avoid "overdiscovery" by disclosing only documents categorized as relevant according to mutually agreed criteria. Interrogatories are uncommon in Australian litigation and should be used for the ascertainment of relevant facts. They should not be used to obtain opinions or to foreshadow the trial itself.⁴⁰ Pretrial depositions are not used in Australian litigation. Procedures for e-discovery are well established and well used in commercial litigation.

Australian law does provide for legal professional privilege between lawyers and their clients. Legal professional privilege is governed by statute law at the Commonwealth level and in New South Wales and Tasmania, while the common law governs legal professional privilege in the remaining states. Although minor variations exist between the various jurisdictions of Australia and between pretrial and interlocutory processes, legal professional privilege, generally speaking, will attach to communications between a client and a lawyer made for the dominant purpose of giving or obtaining legal advice, as well as communications made to facilitate litigation that is ongoing or reasonably anticipated.

Companies should consider product liability insurance. Such insurance is widely available in Australia.

Lawyers are not entitled to charge contingency fees that are calculated as a percentage of the client's award. Although Australian courts retain wide discretion regarding costs, typically the unsuccessful party is ordered to pay the costs of the successful party as "taxed or agreed." "Taxation" of costs means a judicial assessment of them. Typically, a successful party recovers somewhere between 50 and 65 percent of its actual costs. These costs include external legal costs, such as the fees paid by the successful party to its legal counsel. They do not usually include the costs of the successful party's own staff or management time.

⁴⁰ *Chan v. Minister for Immigration and Ethnic Affairs* (1983) 49 ALR 593.

CLASS ACTIONS IN AUSTRALIA

Class actions are a relatively recent phenomenon in Australia and are an important development in the Australian legal landscape. However, the ins and outs of class actions in Australia remain somewhat of a mystery. Common questions include: What constitutes a class? What types of allegations do class actions typically raise? How come Australia hasn't seen an explosion of class actions as in the United States?

This chapter provides an overview of class actions in Australia, with a particular emphasis on trends and developments and a comparison with class actions in the United States.

THE BEGINNING: 1992 AMENDMENTS TO THE FEDERAL COURT OF AUSTRALIA ACT 1976 (CTH)

Class actions were introduced in Australia in 1992, with the amendment (Part IVA) of the Federal Court of Australia Act 1976 (Cth) (the "Act") to include representative proceedings, or "class actions."¹ Victoria also has a class action procedure in terms very similar to those of the Federal Court.² This chapter will focus on class actions in the Federal Court.

The policy and purposes underlying Part IVA of the Act were identified in the second reading speech for the bill that introduced it:

The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.

The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more

cheaply and efficiently than would be the case with individual actions.³

Class actions were introduced to help provide access to justice for those who might need assistance. While class actions are being used by individuals who could not otherwise afford to pursue their claims, they are also being used by large corporate entities and funded by litigation funders, as explored in this chapter.

THE NUTS AND BOLTS OF CLASS ACTIONS IN AUSTRALIA

COMMENCING PROCEEDINGS: WHAT CONSTITUTES A CLASS?

The requirements to commence a class action in the Federal Court are set out in Section 33C of the Act, which provides that where:

- Seven or more persons have claims against the same person;
- The claims of all those persons pertain to, or arise out of, the same, similar, or related circumstances; and
- The claims of all those persons give rise to a substantial common issue of fact or law;

a proceeding may be commenced by one or more of those persons on behalf of some or all of them.

The requirement that the plaintiffs have claims against the same person or persons requires, at a minimum, that all class members have claims against at least one

1 Insertion of Part IVA (§§ 33A–33ZJ).

2 Supreme Court Act 1986 (Vic), Part 4A.

3 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, November 14, 1991, 3174 (Michael Duffy, Attorney-General). Similar comments have been made in the Victorian legislature in relation to its class action regime: see Victoria, *Parliamentary Debates*, Legislative Council, October 4, 2000, 429, 430–32 (M.R. Thomson, Minister for Small Business).

defendant, though those claims need not be identical or even likely to succeed. It was generally understood from *King v. GIO*⁴ that all group members must plead a claim against each and every respondent. However, in *Bray v. F. Hoffman-La Roche*,⁵ Justice Finkelstein suggested that the purpose of the class action procedures would be undermined if the subset of plaintiffs in a class action which had related claims against a person other than the “same person” did not have the right to join their proceedings to the main action. In any case, this requirement is satisfied if one claim against all the respondents is maintainable by all class members, even if other claims are not available to all the members.⁶

The requirement for the class action to arise out of the same, similar, or related circumstances requires some relationship to exist between the relevant circumstances, but not for them to be identical.⁷ In the shareholder litigation context, Justice Mansfield in the *Harris Scarfe* proceedings held that a class of 11,300 members, relying on alleged misrepresentations in more than 77 documents produced over a five-year period, still had the necessary quality of “relatedness.”⁸

The requirement for the class action to involve a substantial common issue of law or fact requires the relevant issue to be “real or of substance,” but not necessarily “large or significant.”⁹ In *GIO*, it was held that a class action was available where there was a substantial common issue of fact and law as to whether conduct was misleading and deceptive, even though liability may ultimately require proof of reliance or damage.¹⁰

Section 33C provides that:

an applicant may begin a representative proceeding for *some or all* of the persons satisfying the s 33C criteria: that is, the persons having claims that arise out of the same, similar or related circumstances giving rise to a substantial common question of law or fact. This provision has frequently been used to enable persons to group together in a class action and to agree upon a way of bringing their claims forward, whether that be agreement as to the solicitor they will all retain, agreement as to

contributions to a ‘fighting fund’, or agreement to obtain litigation funding.¹¹

The academic literature has suggested that “to ensure that the interests of class members are protected, it is essential for the court to have a significant role in the approval or rejection of proposed settlements.”¹²

REQUIREMENTS OF THE ORIGINATING PROCESS

Section 33H of the Act provides that an originating process for a class action must:

- (1) (a) describe or otherwise identify the group members to whom the proceeding relates; and
(b) specify the nature of the claims made on behalf of the group members and the relief claimed; and
(c) specify the questions of law or fact common to the claims of the group members.
- (2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.”

Consequently, a class action may be unable to proceed if the group or the common questions cannot be adequately defined.

An application commencing a class action may be struck out unless “the description is such as to enable a person, with the assistance of a legal adviser if necessary, to ascertain whether he or she is a member of the class.”¹³ In the *GIO* class action,¹⁴ the Federal Court held that it was sufficient properly to identify the relevant class by describing it as those persons who had not accepted a particular takeover offer by reason of the conduct alleged against all or any of the respondents and who had suffered loss as a consequence.

STANDING

A person has standing to commence a class action who “has a sufficient interest to commence a proceeding on his or her own behalf against another person [that] has a sufficient interest to commence a representative

4 *King v. GIO Australia Holdings Limited* [2000] 174 ALR 715 at 725; *Johnstone v. HIH Insurance Ltd* [2004] FCA 190.

5 (2003) 130 FCR 317 at [248].

6 Note 4.

7 *Zhang v. Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 404.

8 *Guglielmin v. Trescowthick (No. 2)* [2005] FCA 138 at [48]–[49].

9 *Wong v. Silkfield Pty Ltd* (1999) 199 CLR 255 at 266.

10 *King v. GIO Australia Holdings Limited* [2000] 174 ALR 715.

11 B. Murphy & C. Cameron, “Access to Justice and the Evolution of Class Action Litigation in Australia,” [2006] 30 *Melbourne University Law Review* 418.

12 *Id.*

13 *Petrusevski v. Bulldogs Rugby League Club Ltd* [2003] FCA 61 at [23], [25]; *Johnstone v. HIH Insurance Ltd* [2004] FCA 190.

14 Note 10.

proceeding against that other person on behalf of other persons referred to in that paragraph.”¹⁵

The purpose of Section 33D(1) is to overcome the common-law standing rule that says A may not bring a damages action on behalf of B against C. It also has the effect that the representative party must be a member of the group to be able to initiate proceedings.¹⁶

THE RIGHT TO OPT OUT

The Act adopts an opt-out procedure for group members to inform the court that they do not wish to be part of the proceedings. An opt-out class action is commenced without the express consent of the “absent” class members. If a group member falling within the defined class does not opt out, then he or she is bound by the outcome of the proceedings under Section 33ZB. Under Section 33X(1)(a), the right to opt out is given effect by the requirement that group members receive notice of that right and of the commencement of the proceedings.

Since the Full Federal Court decision in the *Multiplex* class action,¹⁷ it is now possible to have a “limited group” class action, provided that the group is formed before proceedings are commenced. In that case, the Court found that members of a class could be limited to those investors who had entered an arrangement at the commencement of the action with a particular firm of lawyers and a litigation funder. Such a class, however, cannot be defined to allow putative class members to opt into the proceedings once they have been commenced.

DISCONTINUING A CLASS ACTION

Under Section 33N of the Act, the court of its own motion or on application by the respondent may order that the proceeding not continue as a representative proceeding (i.e., class action) where it would be in the interests of justice not to continue because:

- The costs that would be incurred if the proceeding were to continue as a representative proceeding would likely exceed the costs incurred if each group member conducted a separate proceeding;
- The relief sought could be obtained by means of a proceeding other than a representative proceeding under this Part;

- The representative proceeding would not provide an efficient and effective means of dealing with the claims of the group members; or
- It would be otherwise inappropriate for the claims to be pursued by means of a representative proceeding.

This means that even though the threshold requirements of Section 33C may be met, a court may use its discretion under Section 33N to order the discontinuance of a class action. In practice, however, this rarely occurs. A court will generally employ case management techniques to assist the proceedings to continue, at least until the resolution of the substantial common issues.

Section 33M also provides for the discontinuance of representative proceedings where, if judgment were to be given in favor of the representative party, the cost to the respondent of identifying the group members and distributing the amounts ordered to be paid to them would be excessive with regard to the likely total of those amounts.

In determining whether proceedings would provide an efficient means of dealing with claims of class members, the court will consider findings which may be made in the applicant’s case and the extent to which those findings are likely to resolve other claims.¹⁸ The court may strike out a class action on the basis that it is “otherwise inappropriate” by reason of the “unsatisfactory nature of the pleading”—although again, this rarely occurs in practice.¹⁹

The adoption of Section 33N in the Victorian legislation (which mirrors Section 33N of the Act) was strongly criticized. For example, a report prepared for the Attorney-General’s Law Reform Advisory Council criticized the extent to which Section 33N had “generated unnecessary litigation as most defendants, opposing class suits, have invariably relied on one or more [of the Section 33N provisions] to argue that the court should stop the claims being pursued by means of a representative proceeding.”²⁰

COSTS

Section 43(1A) of the Act provides that the court may award costs in representative proceedings against the representative party only, not the group members.

15 Section 33D(1) of the Act.

16 *Symington v. Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164 at 167C per Wilcox J.

17 *P. Dawson Nominees Pty Ltd v. Multiplex* [2007] FCA 1061.

18 *Bright v. Femcare Ltd* (2002) 195 ALR 574.

19 *Johnstone v. HIH Insurance Ltd* [2004] FCA 190.

20 V. Morabito & J. Epstein, “Attorney-General’s Law Reform Advisory Council, *Class Actions in Victoria—Time for a New Approach*, Project No. 16 (1995) [7.22]–[7.28].

In practice, the costs obligation may be undertaken by a litigation funder who indemnifies the representative party, and other group members who sign up for funding, in exchange for a share of any monetary judgment. Details on the role played by litigation funders in Australian class actions are provided below.

SETTLEMENT

Unlike nonrepresentative proceedings, a class action may not be settled or discontinued without the approval of the court.²¹ In addition, unless the court is satisfied that it is just to do so, an application for approval of a settlement must not be determined unless notice has been given to group members.²²

Australian courts have drawn on factors relevant in U.S. class actions to determine whether to approve a settlement. Those factors include:

- Whether a fair and reasonable amount will be paid as part of the settlement;
- Whether particular segments of the class will be treated significantly differently from others, including the amount of monetary relief that will go to the named plaintiffs as compared to other class members and whether the difference will be disproportionately large;
- Whether the major claims or types of relief sought in the complaint have been omitted from the settlement;
- How many class members object to the settlement and whether those objections are valid;
- The amount and nature of the discovery or evidence obtained;
- Any recommendations of neutral parties and counsel, made in good faith and without collusion;
- The amount of attorneys' fees payable; and
- The way in which notice was given and the extent of information provided to the participants, including as to the proposed terms of settlement, remedy, and predicted quantum.²³

Securities class actions filed in Australia have generally been resolved through a court-approved settlement.²⁴ Settlements have become more common in Australian class actions in recent years. For example, only three of the seven resolved securities class actions that were filed before 2004 settled. In contrast, all five resolved securities class actions that were filed after 2003 were settled out of court.

REPRESENTATIVE PROCEDURES IN OTHER STATES AND TERRITORIES

In New South Wales and other Australian states and territories, representative procedures exist, but they are not, strictly speaking, "class actions." They involve "same interest" procedures.

In New South Wales, the Courts and Crimes Legislation Further Amendment Act 2010 (NSW) introduced a new Part 10 to the Civil Procedure Act 2005 (NSW), which took effect on March 4, 2011, and sets out the procedure for representative proceedings in the Supreme Court of New South Wales. The regime is modeled on Part IVA of the Act, adapted to mirror the language used in the Uniform Civil Procedure Rules, which govern procedure in the Supreme Court of New South Wales.

The regime for representative proceedings in the Supreme Court of New South Wales differs from that in the Federal Court of Australia in two significant ways:

- The plaintiff may represent a limited class of persons; and
- A representative proceeding can be taken against several defendants when not all group members have a claim against all defendants.

This has led some commentators to suggest that the new procedure for representative proceedings in the Supreme Court of New South Wales could "creat[e] the potential for a further increase in the number of class actions being commenced."²⁵

THE CURRENT LANDSCAPE: CLIMB EVERY MOUNTAIN

There were concerns that the introduction of Part IVA might lead to a rush of litigation in Australia. During the Second Reading Speech of Pt IVA, the then Shadow Attorney-General, Mr. Peter Costello, stated that "this Bill is a step on the way to making Australia a more litigious society. It will encourage the proliferation of litigation in this country."²⁶

Despite such predictions, relatively few securities class actions were filed prior to 2004. It has been suggested that the main reasons for the slow commencement of class actions in Australia are:

21 Section 33V of the Act.

22 Section 33X(4) of the Act.

23 *Williams v. FAI Home Security Pty Ltd (No. 4)* (2000) 180 ALR 459 at 465–66.

24 G. Houston, S. Starykh, A. Dahl & S. Anderson, *Trends in Australian Securities Class Actions: 1 January 1993–31 December 2009*, NERA Economic Consulting, May 2010.

25 "Spoilt for choice—NSW regime for representative (class) actions comes into effect," Mallesons Stephen Jaques, March 9, 2011.

26 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, November 26, 1991, 3284–85.

- The capital constraints of Australia's locally organized legal profession;
- A “lack of imagination” on the part of plaintiffs' lawyers;
- Plaintiffs' initial difficulties in complying with the requirements for commencing class actions; and
- Difficulty with the funding of class actions.²⁷

Following the high-profile collapse of a number of companies in the early 2000s, including HIH and OneTel, shareholders have demonstrated that they are increasingly willing to use class actions as a “tool to protect themselves from harmful conduct, and to punish offenders.”²⁸ Since 2000, there has been a significant increase in the number of class actions in Australia, most recently in securities class actions.²⁹ As of October 2009, 242 class actions had been commenced under Part IVA of the Act since its inception in 1992. Product liability and securities (or investor) claims comprise just under half of the class actions filed in the Federal Court to date, with investor class actions comprising approximately 75 percent of recent annual claims filed.

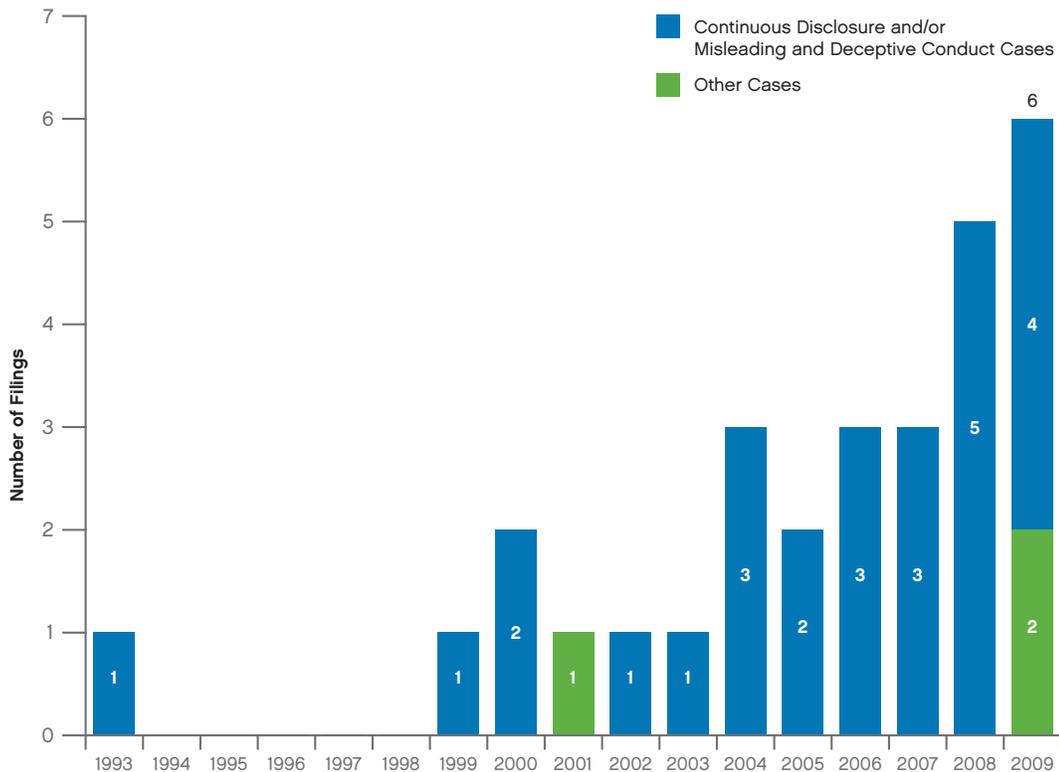
A study by NERA Economic Consulting, *Trends in Australian Securities Class Actions: 1 January 1993–31 December 2009*, found that:

- More than half the securities class actions filed between 1999 and 2009 alleged either misleading or deceptive conduct, or failure by companies promptly to disclose information material to the value of their securities;
- Settlement is the most likely outcome of securities class action cases in Australia; and
- Eight of the 12 class actions resolved by the end of 2009 were settled.

From 2004, securities class action filings have increased steadily, with a record six cases filed in 2009—see Figure 1 below.³⁰

The study also reveals that the two primary causes of action in Australian securities class actions are contraventions of the continuous disclosure rules, which require listed companies promptly to disclose information

Figure 1. Cause of Action and Securities Class Action Filings
1 January 1993 – 31 December 2009



27 S. Clark & C. Harris, “The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?,” [2008] 32 *Melbourne University Law Review* 775.

28 C. Waters, “The New Class Conflict: The Efficacy of Class Actions as a Remedy for Minority Shareholders,” 25 *Company and Securities Law Journal* 300 [2007], 302.

29 Note 27.

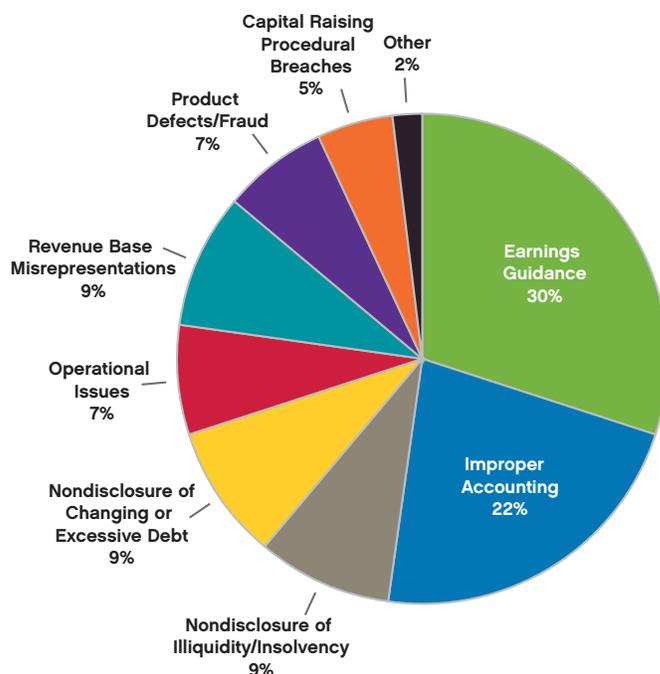
30 Note 24.

material to the value of their securities, and laws prohibiting misleading and deceptive conduct.³¹ In addition to these primary forms of contravention, a significant number of allegations in Australian securities class actions are made in relation to breaches of fiduciary trust.

misstatements, and failures to disclose escalating debt levels or imminent insolvency. The distribution of allegations by type in filings from 1999 to 2009 is illustrated in Figure 2 below.³²

The types of allegations in Australian class actions relate primarily to inaccurate earnings guidance, accounting

Figure 2. Types of Allegation
1 January 1999 – 31 December 2009



THE ROLE OF LITIGATION FUNDERS

Since the High Court of Australia approved commercial litigation funding in the 2006 decision of *Fostif*, commercial litigation funding in Australia has grown.³³ The availability of commercial litigation funding has improved the incentive and ability for investors to initiate class actions, without needing to pool their own funds to pay for what can be

lengthy and costly proceedings. The vast majority of shareholder class actions commenced in Australian courts since 2005 have been funded by commercial litigation funders.³⁴

Litigation funders enjoy a dominant position in the Australian class action landscape, as contingency fee agreements are not permitted in any Australian

³¹ Note 24.

³² Note 24.

³³ In *Campbells Cash & Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, the High Court of Australia (by a 5-2 majority) on the question of litigation funding affirmed the decision of the New South Wales Court of Appeal in *Fostif Pty Ltd v. Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203.

³⁴ Note 27. The litigation-funding mechanism is, broadly, as follows: a nonlawyer or corporation, the "promoter," identifies a potential claim and then enters into agreements with potential applicants. Under these agreements, the promoter receives an agreed percentage of any monies that are received by the applicant, by way of either settlement or judgment. This percentage is typically between one-third and two-thirds of the proceeds. In addition, the applicants assign to the promoter the benefit of any costs order they may receive. The promoter then retains a lawyer who agrees to conduct the litigation on behalf of the promoter. The promoter generally retains broad discretion to conduct the litigation as it sees fit.

jurisdictions. While the prohibition of contingency fee agreements applies to lawyers, nonlawyers are not so constrained. Thus, a new breed of organization has emerged in Australia to promote and fund class action litigation—litigation funders. Australia is home to two of the world's few publicly listed litigation funders: IMF (Australia) Ltd (“IMF”) and Hillcrest Litigation Services Ltd.

Despite the growth of local litigation funders, plaintiffs' law firms have in some instances obtained funding from abroad. Several recent class actions have been funded by U.S. funders, including:

- The *Centro* class action, funded by Commonwealth Legal Funding LLC;
- The *Opes Prime* class action, funded by Commonwealth Legal Funding LLC; and
- The *Babcock & Brown Power* class action, funded by interests associated with the California law firm Wasserman, Comden & Casselman.

RECENT CLASS ACTIONS IN AUSTRALIA

Examples of recent class actions filed in Australian courts include the *GIO*, *Aristocrat Leisure*, *Telstra*, *ABC Learning*, and *Babcock & Brown Power* cases (some of which are discussed below). Class actions in Australia have occurred in a range of different contexts, such as:

- Shareholder class actions (for example, the *GIO*, *Multiplex*, *Centro*, and *Aristocrat* actions);
- Cartel class actions (for example, the *Air Cargo* action);
- Product liability class actions (for example, the *Vioxx* and *Femcare* class actions); and
- Financial services and planners class actions (for example, the *Westpoint* action).

GIO

In August 1999, a class action was commenced by shareholders of *GIO* against *GIO* Insurance Limited and *GIO*'s directors, alleging that *GIO* had provided misleading information in opposing a hostile takeover. The Federal Court approved a settlement of \$97 million³⁵ plus costs in August 2003. Approximately 23,000 shareholders remained in the relevant class by the time of settlement.

Aristocrat Leisure

In August 2008, the Federal Court approved a \$144.5 million settlement of the *Aristocrat* shareholder class action

following a four-week trial in October 2007. The action alleged that *Aristocrat* breached the continuous disclosure regime and engaged in misleading and deceptive conduct.³⁶

Vioxx

In October 2004, class actions were filed against Merck, a global pharmaceutical and chemical company, in the United States. In December 2005, Slater & Gordon commenced proceedings in the Supreme Court of Victoria against the relevant Australian Merck entities. This class action was the first hearing relating to the arthritis drug *Vioxx* outside the United States, and the first successful class action in the world brought against its manufacturer, Merck. On March 5, 2010, the Federal Court of Australia handed down its decision against Merck.³⁷ Merck has indicated that it will appeal the decision.

Westpoint

In the *Westpoint* class actions, it is alleged that the financial advisors should not have recommended certain risky products to investors who formed the class. The proceedings were initiated by the Australian Securities and Investments Commission (“ASIC”) and Slater & Gordon, with IMF providing litigation funding in some of the cases. As of December 2009, ASIC had reached settlements with three financial advisors. One settlement was confidential; the other two actions settled for a total of \$8.5 million, with investors receiving between 43 and 63 percent of the capital they invested.³⁸

Opes Prime

The class actions against *Opes Prime* alleged negligence and breaches of the Corporations Act 2001. The Australia and New Zealand Banking Group Limited (“ANZ”) and Merrill Lynch were also named as respondents in the class actions and are alleged to have sold their clients' shares contrary to their clients' margin lending agreements with *Opes Prime*.³⁹ In July 2009, the class actions against *Opes Prime* were both settled when the company's creditors voted in support of a scheme of arrangement.

Amcor and Visy

A class action representing more than 1,000 businesses was commenced against cardboard manufacturers Amcor and Visy, alleging that the companies entered into a cartel to fix the price of corrugated fiberboard packaging and reduce competition for each other's customers between

35 Unless indicated otherwise, all amounts herein are expressed in Australian dollars.

36 It is reported that IMF received revenue of \$35.4 million and made a profit of \$24 million by funding this class action. See “The bank slayers,” *The Sydney Morning Herald*, May 12, 2010.

37 *Peterson v. Merck Sharp & Dohme (Aust) Pty Ltd* [2010] FCA 180.

38 Note 24.

39 Note 24.

2001 and 2003. Amcor and Visy settled the action in March 2011 for \$97 million, two-thirds being payable by Amcor.

Centro

In late 2007 Centro revealed accounting inaccuracies conflating billions of dollars of current liabilities with noncurrent liabilities. Following the announcement, Centro's stock decreased in value by approximately 90 percent. ASIC successfully prosecuted the company's directors for their failure to notice the error or seek clarification from the managers and auditors.

In May 2008 two shareholder groups commenced class actions against Centro. The first was represented by Maurice Blackburn and funded by IMF, while the second was represented by Slater & Gordon. Both alleged a failure by Centro to meet its continuous disclosure obligations and claimed statutory compensation. In October 2010 PricewaterhouseCoopers was joined as Centro's auditors under allegations of misleading and deceptive conduct.

The parties settled in May 2012 after a swath of interlocutory applications and a 10-week hearing in the Federal Court. The settlement sum is reported to be \$200 million—the largest yet in the history of Australian class actions. Of that total, PricewaterhouseCoopers will contribute \$67 million. Centro will contribute \$85 million plus \$38 million in insurance proceeds, and Centro Properties will make up the remaining \$10 million.

The case is significant for at least two other reasons. First, like *Westpoint*, it evidences the “increased willingness” to sue financial advisors in class actions.⁴⁰ Second, there was notable competition between Maurice Blackburn and Slater & Gordon as to who should control the class action. Justice Finkelstein refused a stay of either action on the basis of a “first past the post” rule, which could “lead to a race to the courthouse” by half-baked claims and the “incentivising” of “inappropriate conduct” by law firms seeking to recruit suitable plaintiffs first.⁴¹ If a choice were to be made, he suggested a comparison between the firms' relative experience in securities class actions, along with their costs, and the terms of funding; the establishment of an independently selected litigation committee; and a sealed-bid auction process.⁴² Otherwise, the firms would have to establish a protocol for working together (which they ultimately did).

THE FUTURE: ARE THE HEAVENS ABOUT TO OPEN?

Class actions, particularly securities class actions, are an increasingly common feature of the Australian legal, corporate, and regulatory landscape. Australia's largest litigation funder, IMF, has indicated that it is bracing itself for an increase in class actions over the next few years.⁴³

Despite the tones of recent headlines—highly unsavory from a lawyer's perspective—it appears that Australia is witnessing its largest-ever class action.⁴⁴ The litigation funder IMF has set up a web site where potential participants can register their interest in joining an anticipated class action against 12 banks (both national and foreign) alleging that the banks have overcharged customers \$5 billion in penalty and late fees. The basis of the legal challenge is that one party to a contract, when it seeks damages from the other party for breaking a contractual term, such as by not paying on time, can recover only a reasonable pre-estimate of its actual costs.⁴⁵

In a preliminary hearing, it was argued on behalf of 27,000 ANZ customers that more than \$50 million in fees charged over the previous six years were illegal. Justice Gordon of the Federal Court held that the majority of the impugned fees were incapable of constituting a penalty as a matter of contract law, not being conditional on breach of contract. At the time of writing, both the test-case defendant ANZ and the bank customers intended to appeal the finding.

With Westpac, National Australia Bank (“NAB”), Citibank, and the Commonwealth Bank joined as defendants, the class action now embraces some 150,000 bank customers and \$197 million in compensation claimed. Maurice Blackburn, the firm representing the class action, has signaled that additional claims could be lodged in 2012 against St George, Bankwest, and BankSA as well as Suncorp, HSBC, and Bank of Bendigo. The “big four” most recently joined have all indicated their intention to defend the action. The banks will have to argue, at least in relation to late fees, that they are a reasonable pre-estimate of their actual costs.

40 E. Knight, “Centro class action opens lawsuit door,” *The Sydney Morning Herald*, May 9, 2012.

41 *Kirby v. Centro Properties Limited* [2008] FCA 1505, [29].

42 *Kirby v. Centro Properties Limited* [2008] FCA 1505, [32]–[34].

43 A. Ferguson, “Class Actions on the Increase,” *The Australian*, January 4, 2008, 15.

44 A. Ferguson & M. West, “Feeding frenzy as lawyers smell blood,” *The Sydney Morning Herald*, May 13, 2010.

45 A. Ferguson & M. West, “Fee gouging: banks face huge class action,” *The Sydney Morning Herald*, May 12, 2010.

CURRENT AND PROSPECTIVE CLASS ACTIONS

NAB

NAB is currently subject to a \$450 million class action brought in 2010 on behalf of some 230 investors in the Victorian Supreme Court. The action, organized by Maurice Blackburn, relates to the bank's disclosure of its collateralized debt obligations during the global financial crisis. The shareholders claim that they should have been warned earlier by the bank that it held \$1.2 billion in investments linked to the U.S. subprime-mortgage collapse. The bank initially revealed the portfolio in the first half of the 2008 financial year, taking a \$181 million provision, and followed this with a second provision of \$830 million two months later, which caused a drop of 16 percent in NAB's share price. The \$450 million claimed relates to this price drop and indicates the involvement of several large institutional investors in the action. At the time of writing, NAB was seeking to discover the identity of these investors as well as the details of their shareholdings.

This class action has also been beset with procedural delays. Justice Pagone postponed a hearing scheduled for December 20, 2011, being unable to read the lengthy affidavits filed by both sides within the allotted time. The judge commented that he was "bemused that it should take so much material" and that reading the volume of documents filed was "not a very useful way to focus the mind." He advised both sides to take a "big red pen" to their submissions before the next hearing date, which was January 31, 2012.

Feltex

Following Feltex's 2006 collapse, a group of shareholders commenced a class action against various parties involved in the carpet maker's float, including the vendor Credit Suisse Boston Asian Merchant Partners LP. The class action, led by Blenheim student Eric Houghton, claims that the Feltex prospectus issued in 2004 was misleading and in breach of the Fair Trading and Securities Acts. The action is being backed by London-based Harbour Litigation Funding and involves more than \$100 million in damages claimed.

MFS and KPMG

On December 14, 2011, a class action by investors against the accounting firm KPMG and former directors and executors of the MFS property group was allowed to proceed in the Federal Court of Australia by Justice Perram. The class action was limited to registered holders

of units in the fund between January 2007 and October 2008, the date when redemptions were frozen. The claim against KPMG relates to an alleged breach of the compliance auditor's duty under the Corporations Act as well as a negligence claim. The allegation leveled at the former directors and executives of MFS is that they failed to prevent the issuance of unsecured loans by the fund to related parties that they should have known were not authorized.

The suit was originally filed in April 2009 but suffered from what the judge referred to as a "tortured procedural history," a "long and drawn-out procedural Stalingrad in which no quarter will be given." Two unduly long statements of claim had previously been rejected, with the class action represented by three successive firms of solicitors and three successive senior barristers. Justice Perram has rejected a claim by the defendants for indemnity costs but has awarded the costs thrown away on the earlier pleadings.

Big Tobacco

The Federal Attorney-General, Nicola Roxon, has indicated the possibility of a class action to be filed against Big Tobacco companies on behalf of the Australian states, to recover an estimated \$31.5 billion a year in smoking-related costs to the public health system. The government has taken legal advice and has been in consultation with U.S. lawyer and anti-smoking lobbyist Matthew Myers, advisor to 50 U.S. state attorneys general in similar lawsuits instituted against Big Tobacco in the 1990s. Victorian Health Minister David Davis has confirmed that his department is currently assessing the viability of legal arguments made in those proceedings, which culminated in US\$246 billion in compensation paid over 25 years.

Despite the increase in the number of class actions before the Australian courts, attention has been drawn to strategies adopted by defendants when running a case before the courts. An examination of class actions in Australia reveals that respondents often try to resist claims by invoking technical arguments about the requirements and appropriateness of the class action mechanisms.⁴⁶ These arguments take many forms, including attacks on pleadings,⁴⁷ arguments that the number of common issues is not sufficient to justify the matter's proceeding as a class action,⁴⁸ and arguments that not all members of the class have a cause of action against all respondents.⁴⁹ Such

46 Note 10. See, e.g., *Bright v. Femcare Ltd* (2001) 188 ALR 633; *Bright v. Femcare Ltd* (2002) 195 ALR 574; *King v. GIO Australia Holdings Ltd* [2000] FCA 1543 (Unreported, Wilcox, Lehane & Merkel JJ, November 1, 2000); *Aristocrat* (2005) 147 FCR 394.

47 See, e.g., *Petrusevski v. Bulldogs Rugby League Club Ltd* [2003] FCA 61 (Unreported, Sackville J, February 14, 2003); *Philip Morris* (2000) 170 ALR 487; *Bright v. Femcare Ltd* (2002) 195 ALR 574.

48 See, e.g., *Bright v. Femcare Ltd* (2002) 195 ALR 574, 577–83; *Guglielmin v. Trescowthick [No. 2]* (2005) 220 ALR 515, 527–31.

49 See, e.g., *Philip Morris* (2000) 170 ALR 487, 517–20; *Bray v. F. Hoffman-La Roche Ltd* (2003) 130 FCR 317, 344–46.

tactics were criticized by Justice Finkelstein on appeal in *Bright v. Femcare*:

There is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications, including interlocutory appeals, that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of \$500,000. I say nothing about the respondents' costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible. . . . [I]t is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.⁵⁰

Notwithstanding this, the same judge has also acknowledged the utility of “lawyer-driven litigation” in locating wronged parties who would not otherwise seek redress or even realize that redress was available.⁵¹ Securities class actions in particular “promote investor confidence in the integrity of the securities market,” enabling investors to “recover past losses caused by the wrongful conduct of companies and deter future securities laws violations.”⁵²

Recent commentary on *Centro* has highlighted this dual aspect of litigation-funded class actions, which provide “affordable access to justice” as well as “a clear and unemotive investment in a return for the claimants and those that put up the money to bankroll the case.”⁵³ In 2011 IMF lost just five cases (out of 123) and reported \$37 million in net income. This reflects the use of strict financial criteria as well as the due diligence and book building taking place prior to each action. While the market is still developing, the business of litigation funding is already highly sophisticated.

HOW DOES THE AUSTRALIAN CLASS ACTION LANDSCAPE COMPARE TO THE U.S. CLASS ACTION LANDSCAPE?

It has been suggested that the class action landscape is more “plaintiff-friendly” in Australia than in the United States.⁵⁴ This is because in Australia:

- There is no certification requirement as in the United States (i.e., a requirement to satisfy the court that the proceedings meet the requirements for a class action before it proceeds);
- There is no need to show that the common issues predominate over individual issues—it is enough if there is one common issue that is “real or of substance”;⁵⁵ and
- Australian courts may manage the litigation by splitting the class into subgroups to deal with discrete issues. This gives the Australian courts broad discretion to deal with a group of claims as a class action.

Indeed, such is the “friendliness” of the Australian landscape that Australia has become the most likely place after North America where a company will find itself defending a class action.⁵⁶

On the other hand, the following differences between the Australian and U.S. landscapes make for good hunting for plaintiffs’ lawyers in the United States:

- In the U.S., cases are heard by juries. In Australia, civil matters are usually heard by judges, who may be less likely to award significant payouts.
- There are restrictions on fee arrangements between lawyers and their clients in Australia. For example, lawyers in Australia are not able to charge their clients a percentage of their clients’ damages as a fee and must resort to “no win/no fee” fee arrangements. In the United States, on the other hand, plaintiffs’ lawyers may charge a percentage of the damages received by their clients.
- In the United States, adverse costs orders are not made against unsuccessful litigants as may occur in Australia. In the U.S., each party normally pays its own costs.
- U.S. courts, unlike Australian courts, may award punitive damages to plaintiffs.

50 (2002) 1995 ALR 574, 581–82.

51 *Kirby v. Centro Properties Limited* [2008] FCA 1505, [4].

52 *Kirby v. Centro Properties Limited* [2008] FCA 1505, [8].

53 E. Knight, “Centro class action opens lawsuit door,” *The Sydney Morning Herald*, May 9, 2012.

54 Note 27.

55 *Wong v. Silkfield Pty Ltd* (1999) 199 CLR 255 at 266.

56 Note 27.

- In Australia, each individual shareholder belonging to a class who has, for example, allegedly suffered loss as a result of a misleading statement by the company in which it owns the shares must prove that he or she relied on that statement. By contrast, in the United States, it is presumed that the shareholders all relied on the misleading statement made by the company (the “fraud on the market” theory).

CONCLUSION

Class actions in Australia are gaining traction and will increasingly become part of the Australian legal landscape. The growth in litigation funders, ably assisted by a favorable regulatory landscape and a policy of “looking for the big kill,” will underlie this growth. The future is now.

PRODUCT LIABILITY LAW IN CHINA

LIABILITY OF MANUFACTURERS

Product liability is a new area of law in China and therefore is not as well developed in theory or in practice as in the United States. Provisions about product liability are scattered in a number of different laws and regulations. The most important ones are the Tort Law,¹ the Product Quality Law, the Law on Protection of the Rights and Interests of Consumers, and the General Principles of the Civil Law.

CIVIL LIABILITY

Theories of Liability

Under Chapter Five of the Tort Law, product liability is a strict liability tort. Under general tort principles, to be liable for tort, the tortfeasor must be “at fault.” See Article 6 of the Tort Law. However, for product liability claims, a manufacturer is liable as long as “the product has defects that caused harm to others.” Article 41 of the Tort Law. The manufacturer does not need to be found “at fault” to be liable.

A product is defective if “the product poses unreasonable danger to people or property; or if the product fails to conform to the national or industry standard for protection of health, person, and property.” See Article 46 of the Product Quality Law. Any product made by a manufacturer must satisfy three requirements:

- (1) It does not pose unreasonable danger to the safety of person or property; and it complies with any national or industry standards for protection of health, person, and property;
- (2) It functions as such a product should, except for products where flaws in their functions are clearly indicated; and
- (3) It conforms to the product standards indicated on the product or its packaging and to the quality indicated by the product description, physical samples, or other materials.

Article 26 of the Product Quality Law.

Remedies

Where a defective product poses danger to person or property, the injured person has the right to request that

the manufacturer or seller remove the product, eliminate the danger, or take other proper actions. Article 45 of the Tort Law.

Damages

Damages for physical and psychological harm. Compensation for physical harm includes medical expenses, lost wages, transportation costs, and other incidental costs to the injured person, such as costs incurred for seeking medical care in other cities. In general, damages in China are significantly lower than would be found in the United States for comparable tortious injury.

In cases of disability, the damages include expenses for disability-related equipment and disability compensation. In cases of death, a close relative can bring the tort claim, and the damages include funeral expenses and death compensation.

Disability compensation and death compensation are basically compensation for lost income. In China, the lost income is derived by multiplying by 20 the average yearly income in the city or county where the court is located. One year is deducted for each year that the person exceeds 60 years of age. For people older than 75, the lost income is calculated for only five years. See Interpretation of the Supreme People’s Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury.

The Tort Law provides that, in the case of serious psychological harm, damages for mental distress can be sought. Damages for mental distress can include disability compensation, death compensation, and other compensation according to the degree of psychological injury.

Property damages. Property damages are decided according to one of three standards:

- The damaged property’s market value at the time of tort;
- The tortfeasor’s gains if the damages to the plaintiff cannot be decided; or
- At the court’s discretion if the tortfeasor’s gains cannot be decided and the parties cannot agree on the damages amount.

¹ The Tort Law was enacted on December 26, 2009, and became effective on July 1, 2010.

Punitive damages. Under Article 47 of the Tort Law, punitive damages can be claimed when a manufacturer or seller knows of a defect but continues to manufacture or sell the product and causes death or serious injury. There have not been any published cases on punitive damages since the Tort Law came into effect. The cases decided before the effective date of the Tort Law awarded punitive damages under the Law on Protection of the Rights and Interests of Consumers. Article 49 of that law provides that, in addition to the customer's loss, the business must pay twice the amount of the purchase price or service price if the business committed fraud in providing the goods or services to customers.

Defenses

A manufacturer is not liable if it can prove any of several defenses:

- The product is not in circulation;
- When the product was put into circulation, the defect that caused the harm did not exist; or
- When the product was put into circulation, the existing science and technology did not allow discovery of the defect.

Article 41 of the Product Quality Law.

General defenses to tort claims can also apply to product liability cases. Chapter Three of the Tort Law lists certain defenses under which tort liability can be mitigated or relieved:

- If the injured person contributes to the injury, the tortfeasor's liability can be mitigated;
- If the injured person intentionally causes injury, the tortfeasor will not be liable; and
- If the injury is caused by a third party, the third party should take the responsibility.

Availability of Class Actions

There are no U.S.-style class actions in China. Instead, Chinese "class actions" more accurately should be considered "joint actions"—individual cases joined together for efficient administration. Each case in the joint action is still treated as a separate case.

Provisions of joint actions. In China, "class actions" are filed under Articles 54 and 55 of the Chinese Civil Procedure Law. Article 53 provides that if two or more people share the same claim or if their claims share the same type of subject matter, upon their agreement the court can join their actions. Articles 54 and 55 describe the procedure in joint actions where the number of litigants is large.

Article 54 provides that, where one party has numerous litigants, these litigants may elect representatives to represent them in the litigation, and the actions taken by

those representatives bind the litigants. However, unlike in the United States, there is no system of representative class actions in which named plaintiffs can bring an action on behalf of, and bind, unnamed and nonparticipating class members.

According to the directive of the Supreme People's Court, the number of litigants should usually be more than 10. The representatives can be elected by all or some of the litigants. Those who did not agree upon the representatives can either participate in the same case, if their joinder in the case is mandatory, or file their own lawsuits, if their joinder is permissive. The number of representatives can range from two to five, and each representative can hire one or two lawyers.

Article 55 provides that, where the subject matter of the disputes is of the same type, where the litigants are many in number, and where their numbers cannot yet be ascertained, the court may issue a public notice. The notice shall describe the nature of the case and the claims made and inform the interested persons of the need to register with the court within a certain period of time. The judgment of the court binds all interested persons who have registered with the court. The court's decision in the joint action also applies to those who did not register with the court but filed actions within the statute of limitations.

When the courts provide notices under Article 55, the Supreme People's Court requires the notice to be given no less than 30 days before the registration deadline. Those who register with the court must prove their legal relationship with the defendants and their injuries.

Features of joint actions. The joint actions provided in Articles 54 and 55 are different from class actions in the U.S. in many important ways:

- The litigants in the joint actions are those who participated in the lawsuits or those who registered with the court. In other words, they are identified persons.
- Each litigant in the joint action must agree to join the joint action. (Article 53.)
- Because the joint actions are individual actions joined together, each litigant must satisfy the court's jurisdiction requirement. In other words, if the proper jurisdiction or venue varies for each litigant, then the actions cannot be joined. If the cases are important enough, the Supreme People's Court could potentially assume jurisdiction of all the cases and try them together. However, the Court seldom exercises this option for joint actions.
- All or a number of the litigants must agree on the representatives in the joint actions.
- The litigants in the joint actions must actively participate in the litigation, including by providing evidence and rebutting the defendants' evidence.

- The judgment in the joint actions is issued to each litigant separately.
- The judgment binds only those who registered with the court, with the exception of those who did not register with the court but filed actions within the statute of limitations.

CRIMINAL LIABILITY

Theories and Standards

Under the Product Quality Law and the Criminal Law, a manufacturer or seller can be criminally liable for certain conduct:

- (a) Manufacturing or selling certain products that do not meet national or industry standards and cause severe damage:
 - Manufacturing or selling food products that cause severe food poisoning or other food-related diseases;
 - Manufacturing medical equipment or medical products that do not meet national or industry standards, or knowingly selling such products, and causing severe harm to human health;
 - Manufacturing beauty products that do not meet sanitary standards, or knowingly selling such products, and causing severe consequences; or
 - Manufacturing electrical equipment, pressure containers, flammables or explosives, or other products that do not meet national or industry standards, or knowingly selling such products, and causing severe consequences.

- (b) Manufacturing or selling fake or spoiled products:
 - Mixing impurities or imitations into a product, passing a fake product off as a genuine one, passing a defective product off as a high-quality one, or passing a substandard product off as a good-quality one; or
 - Selling a product after it has expired or selling a spoiled product and causing major damage.

Punishment

The criminal penalties for manufacturers or sellers of defective products include fines and imprisonment. The amount of the fines and the length of imprisonment are determined by the severity of the injury to persons, the degree of the harm caused, and other aggravating circumstances.

In some high-profile cases, the punishment can be much harsher. As a result of the Chinese milk-powder scandal of 2008, one person was sentenced to life imprisonment and another was executed. The scandal was a food-safety incident involving milk, infant formula, and other food

materials and components adulterated with melamine. Reports indicated that an estimated 300,000 persons had been harmed in 2008, with six infants dying from kidney stones and other kidney damage and a further 860 babies hospitalized. A number of criminal prosecutions occurred after the incident. One of China's major dairy producers was charged with the offense of producing and selling fake and shoddy goods (Articles 144 and 150 of the Criminal Law), and its former general manager was sentenced to life imprisonment. The former dairy dealer who knowingly produced and sold more than 800 tons of melamine as a protein enhancer was charged with the offense of employing dangerous means to endanger public security (see Article 115 of the Criminal Law) and was executed in 2009.

LIABILITY OF SELLERS

Under the Tort Law, the Product Quality Law, and the General Principles of the Civil Law, a seller can be held liable for harm caused by defective products if the defects are the seller's "fault." If the seller cannot identify a defective product's manufacturer or supplier, the seller shall bear the tort responsibility. See Article 42 of the Tort Law.

An injured person can choose to sue either the manufacturer or the seller. If the manufacturer caused the defects, after the seller compensates the injured person, the seller can seek reimbursement from the manufacturer. Similarly, if the manufacturer compensates the injured person and the seller caused the defect, the manufacturer can seek reimbursement from the seller. See Article 43 of the Tort Law.

PRODUCT RECALLS AND GOVERNMENT ADMINISTRATIVE INVESTIGATIONS OF PRODUCT DEFECTS

LAWS

In China, product recall is administered by the State Administration of Quality Supervision, Inspection and Quarantine (the "AQSIQ") and other ministries that have jurisdiction over specific industries, such as the State Food and Drug Administration (the "SFDA") for food and drug products. Over the years, the AQSIQ has enacted product recall administrative measures for three types of products: motor vehicles, toys, and food. The SFDA has enacted the Administrative Measures for Drug Recalls. In recent years, there has been ongoing discussion regarding the issue of a general recall administrative rule for all types of defective products. A draft of the Defective Product Recall Administrative Measures is under review by the government but has not yet been enacted.

In addition to the four specific product recall measures, the Tort Law generally provides that “[i]f defects are discovered after the product is in the market, the manufacturer and seller shall give timely warnings and recall the defective product or take other remedial measures.” Article 46 of the Tort Law.

GENERAL PROCEDURE OF PRODUCT RECALL

Investigation

A manufacturer is required to investigate product defects in several situations: (i) it receives a consumer complaint of a personal injury caused by the product; (ii) it learns about a product personal injury accident; (iii) it receives a notice from a provincial-level AQSIQ or the State AQSIQ stating that it should conduct a defect investigation; (iv) it believes that the product may have defects affecting human health or safety; or (v) it learns about the possible defects through other means. See Article 8 of the Defective Product Recall Administrative Measures (Draft). See also Provisions on the Administration of Food Recall; Provisions on the Administration of Toy Recall.

After the investigation, the manufacturer is required to report the result of the investigation to the provincial-level AQSIQ or the State AQSIQ.

The AQSIQ can also conduct its own investigation if the manufacturer fails to conduct an investigation, if the manufacturer concludes after its investigation that no defect exists, if there is a severe injury that draws attention, or if other circumstances warrant the investigation.

Recall

Once a defect affecting human health or safety is confirmed, the manufacturer should stop the manufacturing and sale of the product, recall the defective product, and report the recall to the provincial-level or State AQSIQ.

The manufacturer can decide to conduct a voluntary recall of the defective product. If the manufacturer fails to conduct a recall, the State AQSIQ may send it a recall order notice or publication requiring the recall.

The manufacturer should make a plan for recall and submit the recall plan to the AQSIQ. In the case of involuntary recall, the manufacturer must submit the recall plan within a certain number of days of receiving the notice from the State AQSIQ. The State AQSIQ will organize experts examining the recall plan and let the manufacturer know whether the recall plan passes the review.

The recall plan should include information on the type of defects; the cause of the defects; the people who may be affected; the severity and urgency of the problem; the recall method, scope, and time frame; the organization of the procedure; contact information; the plan to notify

consumers, sellers, and the service industry; handling of the defective product; and the anticipated effect of the recall. The recall plan should be submitted to the AQSIQ within a certain time frame.

After the recall has been completed, the manufacturer should submit a recall report to the AQSIQ. The AQSIQ will then examine the report and evaluate the recall's effectiveness.

Punishment

For manufacturers that fail to comply with the recall rules, the punishments include warnings, injunction orders to correct the defects within specific time periods, fines, revocation of business licenses, and criminal liabilities.

THE LITIGATION PROCESS IN CHINA IN GENERAL

TERRITORIAL JURISDICTION

Article 29 of the PRC Civil Procedure Law (the “CPL”) provides that “a lawsuit brought for a tortious act shall be under the jurisdiction of the people’s court located in the place where the infringing act took place or where the defendant has his domicile.” Article 29 of the Opinions of the Supreme People’s Court on Some Issues concerning the Application of the CPL (“SPC’s Opinions of CPL”) provides more specific information about product liability claims:

A lawsuit concerning the damage of property or personal injury of another person resulting from bad quality of products shall be under the jurisdiction of the people’s court where the products are manufactured, the place where the products are sold, the place the tort is committed, or the domicile of the defendant.

If questions of jurisdiction arise, the court that first puts the case on file assumes the proper jurisdiction, and it shall not transfer the case to another competent court. If the people’s court finds that another competent court has already put the case on file, it shall transfer the case to the court that put the case on file prior to it. See Article 33 of the SPC’s Opinions of CPL.

CHOICE OF LAW

Article 146 of the General Principles of the Civil Law (the “GPCL”) provides that, in torts, “the law of the place where an infringing act is committed applies.” Interpreting this provision, Article 187 of the Implementing Regulations of the GPCL states: “The place where an infringing act is committed includes the *manufacturing place* of the defective product and *the place where damage is caused*. If the two places are not the same, the people’s court may choose which place to apply.”

In addition, Article 44 of the newly enacted Law of the Application of Law for Foreign-related Civil Relations of the People's Republic of China² states that “[f]or tort liabilities, the law of the place where an infringing act is committed applies; but if the parties have a common place of regular residence, the law of that place applies.” It further provides that, after the infringement occurred, the parties can choose the applicable law by agreement.

STATUTE OF LIMITATIONS AND CLAIM LETTERS

For product liability cases, the statute of limitations is *two years* “from the date on which the party knew or should have known that his rights and interests had been infringed.” Article 45 of the Product Quality Law. See *also* Article 135 of the GPCL.

In China, a special tool consisting of “claim letters” can toll the statute of limitations. Under Article 140 of the GPCL, the statute of limitations is tolled upon the filing of a lawsuit, the making of a demand by a party, or the agreement by one party to fulfill its obligations. Under Article 10 of the Supreme People's Court's Interpretation on Statute of Limitations in Civil Cases, a party can make a demand by sending claim letters to the other party, and those claim letters toll the statute of limitations.

When tolled, the limitations period restarts from the end of the tolling period. In other words, the entire period before the tolling does not count, so that the plaintiff will have a new two-year limitations period. Although there is no clear provision, usually the limitations period cannot be infinitely tolled by claim letters. The litigant should bring his or her suit after a reasonable extension of the limitations period.

PROPERTY PRESERVATION

To simplify the enforcement of court orders, Chinese litigants frequently file for property preservation before or soon after they file their lawsuits. If the court issues the preservation order, it may ask the applicant to provide a security for the property preservation. The preservation may include seizure, detainment, freezing of the defendant's property, or other measures. As long as the litigants can identify the assets to be preserved, it is usually not difficult to get the court to issue a preservation order.

DISCOVERY AND EVIDENCE

There generally is no pretrial discovery in China. The parties exchange evidence before or during the trial. However, a party is not entitled to the other party's documents unless the other chooses to use the document as evidence or is ordered by the court to produce documents.

Chinese lawsuits do not use other discovery tools, such as depositions, interrogatories, or requests for admission.

However, Chinese courts have an active role in evidence gathering. They can conduct their own investigations or appoint their own evaluation firms and may occasionally be persuaded to assist litigants with their requests for evidence gathering or preservation.

It is advisable to employ a Chinese entity recognized by the government or the courts to conduct tests or provide evidence to show whether a product is defective. Chinese courts can be suspicious of tests conducted outside China and may not accept the test results as evidence.

TIMELINE

In purely domestic cases between two PRC entities (including foreign-invested enterprises, which are domestic entities), the courts are required to resolve the disputes within certain periods of time (which may be as short as six months).

There is, however, no required timeline to decide cases involving foreign parties. The length of such foreign-related litigation may depend on: (i) the court's case load; (ii) the case's complexity; (iii) the goals and motivations of the parties and their behavior during the case; and (iv) other varying influences.

In addition, for high-profile cases, lower courts typically seek the input of the higher courts and other government agencies before making decisions, adding to the time required.

THE ATTORNEY-CLIENT PRIVILEGE

Article 38 of the PRC Lawyer's Law provides:

A lawyer shall keep confidential the national and commercial secrets he learned during the practice of law. He shall not disclose any information that is the privacy of the client.

A lawyer shall keep confidential [the] situation or information learned during the practice of law that the client or another person does not wish to disclose. An exception exists for facts and information on a crime compromising the national security or public security or seriously endangering the safety of a person or property, which a client or other person is about to commit or is committing.

2 Enacted on October 28, 2010.

Under Article 39 of the Lawyer's Ethical and Disciplinary Rules promoted by the All China Lawyers Association, the duty of confidentiality remains even after the attorney-client relationship ends.

This provision establishes the broad duty of confidentiality that a lawyer owes to his or her client. However, it does *not* fully establish the attorney-client privilege in China, and in particular, there is no privilege against disclosure to governmental authorities. Disclosure of information protected by the duty of confidentiality could be compelled under judicial, statutory, or other legal compulsion.

However, it is possible that the attorney-client privilege may be established in China in the near future. In 2007, the Supreme People's Court chose a number of courts to experiment with the new draft Evidence Law. In that draft, Article 68 provides that a lawyer has the right not to testify about confidential communications with the client or former client. But it is unclear how this will work in practice, given the state's control over the judiciary.

PRODUCT LIABILITY LAW IN JAPAN

Japan's Product Liability Act (Act No. 85 of 1994, or the "Act") was enacted in 1994. It went into effect on July 1, 1995. The Act was influenced, to some extent, by U.S. product liability law and the Council Directive of the European Economic Community, which both focus on product defects, but some provisions are particular to Japan.

Before the Act, civil claims for product defects proceeded under contract or tort law set forth in Japan's Civil Code. A plaintiff had to prove the manufacturer's negligence or its intent to manufacture defective products, along with causation and damage. Because the Act does not apply to all product defect cases, the Civil Code still plays an important role in cases of product liability. Furthermore, the Act includes no criminal provisions or product recall regulations; these liabilities and regulations are provided by other statutes.

CIVIL LIABILITY

STRICT LIABILITY UNDER THE ACT

The Act provides so-called strict liability. The main clause in Article 3 of the Act states that "[t]he manufacturer . . . shall be liable for damages arising from the infringement of life, body or property of others which is caused by the defect in the delivered product." Proof of the manufacturer's negligence or intentional misconduct is not required to seek monetary damages under the Act. Those seeking monetary damages under the Act must prove only a product defect, damage, and causation between the defect of the product and the damage.

Article 2 of the Act defines "products" as movables that are manufactured or processed.¹ This definition does not include real estate, intangible assets like software and electricity, or unprocessed raw materials.

Article 2, paragraph (2), of the Act defines "defect" as "a lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer . . . delivered the product, and other circumstances concerning the product." "Defects" are theoretically classified, as in the U.S., into three groups: design defect, manufacturing defect, and warning defect. Regardless of classification, however, judges will find a defect when the product lacks the safety that the product should ordinarily provide.

Article 2, paragraph (3), (i)–(iii), defines "manufacturer" not only as the manufacturer of the defective product, but also as any person who "processed[] or imported the product in the course of trade," along with:

any person who provides his/her name, trade name, trademark or other indication . . . on the product as the manufacturer of such product, or any person who provides the representation of name, etc. on the product which misleads . . . others into believing that he/she is the manufacturer . . . [or] any person who provides any representation of name, etc. on the product which, in light of the manner concerning the manufacturing, processing, importation or sales of the product, and other circumstances, holds himself/herself out as its substantial manufacturer.²

The Act is not generally applied to distributors, sellers, and retailers. The fact that product importers are potentially liable does not exempt foreign manufacturers from the Act; they can be sued in Japan. But because there are often difficulties in suing foreign manufacturers, the Act allows plaintiffs to sue importers as an easy way to seek monetary damages.

The Act does not specify the compensable damages. Therefore, the Civil Code³ determines the recoverable damages. Those damages are the costs that ordinarily arise from the defect. Depending on the case, the damages recovered may include cost of repair, bodily

1 Article 2, paragraph (1), of the Act.

2 Article 2, paragraph (3), of the Act.

3 Article 6 of the Act states, "Other than as provided in this Act, the liability of the manufacturer . . . for damages caused by a defect in a product shall be subject to the provisions of the Civil Code . . ."

injury, economic damage, and noneconomic damage like pain and suffering.

However, the Act is not applied when the defect damaged only the product itself and not life, body, or other property. In this case, the Civil Code provides the owner's remedy for monetary damages.

Article 4 of the Act provides two defenses other than the general defenses under the Civil Code.⁴ One is the "state-of-the-art defense."⁵ The other is the "design-direction defense."⁶

Article 4, paragraph (1), provides that manufacturers shall not be liable when they could not have discovered the product defect given the state of scientific or technical knowledge at the time the product was delivered ("state-of-the-art defense"). The "state of scientific or technical knowledge" is interpreted as the highest scientific or technical knowledge obtainable. This defense is not easily accepted by judges.

Article 4, paragraph (2), provides that component manufacturers shall not be liable when the defect occurred primarily because they complied with the design instructions given by the final-product manufacturer and when the component manufacturers were not negligent with respect to the occurrence of the defect. In order for the component manufacturers not to be liable because they were not negligent, they have to prove that they could not have foreseen or prevented the defects in the final products.

LIABILITY BASED ON CONTRACT, NEGLIGENCE, OR INTENTIONAL TORT

Although it is generally easier to prove strict liability without fault under the Act, sometimes plaintiffs need to claim monetary damages pursuant to the Civil Code. Three causes of action are typically alleged under the Civil Code in order to seek monetary damages in product defect cases.

Breach of Contract—Article 415 of the Civil Code

Article 415 of the Civil Code provides that, if an obligor fails to perform its obligations, the obligee shall be entitled to demand damages arising from this failure. When product manufacturers, distributors, or sellers that have entered into a binding contract commit a breach of one or more contract terms that causes damage, the injured party under the contract can seek damages from them. A manufacturer's breach of express warranty is an example.

Warranty Against Defect on Specified Goods—Article 570 of the Civil Code

When the goods provided are specified goods and those goods are defective, Article 570 may be applied. Examples of specified goods are used cars, previously owned homes, and paintings created by specific artists. Unspecified goods are mass-produced goods, like new cars and new electrical products, including television sets and computers.

Article 570 allows a buyer to cancel the contract and demand compensation for damage, if any, if there is any latent defect in the product sold. If the contract cannot be canceled, the buyer may demand compensation for damage. Thus, if the buyer bought specified goods in which a defect lies latent and that defective product caused damage to the buyer, the buyer can seek monetary damages against the seller. The range of the damages to be recovered is limited under decisions in the Japanese courts. Article 570 does not require the plaintiff to prove the manufacturer's negligence or intent.

Tort—Article 709 of the Civil Code

Article 709 of the Civil Code provides that a person who has intentionally or negligently infringed any right or legally protected interest of others shall be liable for any resulting damage. Article 709 is widely used in civil cases to seek monetary damages for defective products. The causes of action pursuant to Article 709 of the Civil Code include fraud and misrepresentation. Unlike under the Act, plaintiffs have to prove the defendants' intent or negligence in providing defective products.

Defenses Under the Civil Code and the Act

A common defense under the Civil Code is comparative fault. Comparative fault is also applied to a product defect claim brought under the Act. The comparative-fault defense includes a plaintiff's assumption of risk and misuse. The judge determines the gravity of the plaintiff's fault.

Statutes of limitation also provide a defense. Article 724 of the Civil Code provides that:

[t]he right to demand compensation for damages in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the perpetrator. The same shall apply when twenty years have elapsed from the time of the tortious act.

4 The general defenses will be discussed later in this chapter.

5 Article 4, paragraph (1), of the Act.

6 Article 4, paragraph (2), of the Act.

The right to demand compensation for breach of contract is extinguished if it is not exercised within five years when the manufacturer is a merchant. Under Article 5 of the Act:

The right to seek damages provided in Article 3 shall be extinguished by prescription if the victim or his/her legal representative does not exercise such right within three years from the time when he/she becomes aware of the damages and the party liable for the damages. The same shall apply to the case where ten years have elapsed from the time when the manufacturer, etc. delivered the product.

PRODUCT RECALL

THE CONSUMER PRODUCT SAFETY ACT

The Consumer Product Safety Act (the “CPSA”) provides general regulations for manufacturers and sellers of consumer products. The CPSA regulates the manufacture and sale of specified products,⁷ promotes proper maintenance of products, and collects and provides information regarding product accidents.⁸

The term “consumer products” means any products to be supplied mainly for use by general consumers for their routine, everyday activities. However, some products are not included because they are regulated by other laws.

Manufacturers, retailers, and importers of consumer goods have certain responsibilities under the CPSA when product accidents occur:

Responsibility of Business Operators to Collect and Provide Information

Article 34, paragraph (1), of the CPSA requires any manufacturer, importer, or retailer of consumer products to collect and provide information on accidents caused by its consumer products to general consumers. Paragraph (2) of Article 34 further requires any person engaging in the retail, repair, or installation of consumer products who comes to know of serious accidents resulting from the products retailed, repaired, or installed by the person to notify the manufacturer or importer of those consumer products of the accidents.⁹

The CPSA does not impose penalties on the manufacturer, importer, or retailer for violation of its CPSA duties. However, it may be civilly or criminally liable under the Civil and Penal Codes.

Reporting “Serious Product Accidents” to the Prime Minister

Article 35, paragraph (1), of the CPSA requires any manufacturer or importer of consumer products which knows that serious accidents have resulted from its consumer products to report to the Prime Minister the name and type of the consumer products, a detailed account of the accidents, and the quantity of the consumer products manufactured, imported, and sold. Article 2, paragraph (6), defines the term “serious product accidents” to mean product accidents within the scope of a Cabinet Order, which describes the actual or potential danger or the manner of accident as serious.

When the manufacturer or importer fails to make a report or has made a false report in violation of the CPSA’s provisions of Article 35, paragraph (1), described above, the Prime Minister may order the manufacturer or importer to develop a system necessary for collecting, managing, and providing to the public information on the serious product accidents.¹⁰ Violation of an order can subject a person to imprisonment with work for not more than one year, a fine of not more than ¥1 million, or both.¹¹

Responsibilities of Business Operators to Prevent the Occurrence and Increase of Danger

Regardless of whether the accident falls within the category of “serious product accidents,” the manufacturer or importer of consumer products shall investigate the cause of the product accidents and, if necessary to prevent the occurrence and increase of danger, recall the consumer products or take other preventive measures.¹²

The Relationship Between Product Liability and Responsibility Under the CPSA

If a person fails to take reasonable measures imposed under the CPSA, and this failure increases or expands the damage or causes accidents, the person will likely have civil liability pursuant to the Civil Code.

7 The term “specified products” as used in the CPSA means consumer products that are deemed to be highly likely to cause danger to the lives or bodies of general consumers in consideration of these products’ structure, material, and usage, among other factors, as provided by Cabinet Order. (Article 2, paragraph (2), of the CPSA.)

8 Article 1 of the CPSA.

9 The term “accident” here means those accidents resulting from the use of consumer products where danger to the lives or bodies of consumers has occurred or is likely to occur. (Article 2, paragraph (5), of the CPSA.) “Accidents” do not typically include injuries not caused by defects in consumer products, unless a Cabinet Order applies.

10 Article 37, paragraph (1), of the CPSA.

11 Article 58, item (5), of the CPSA.

12 Article 38, paragraph (1) of the CPSA.

Laws on Specific Products

The following types of products are not included as a “consumer product” in Article 2 of the CPSA because specific laws apply:

- (i) Ships described in Article 2, paragraph (1), of the Ship Safety Act;
- (ii) Food described in Article 4, paragraph (1), of the Food Sanitation Act; additives described in paragraph (2) of that article; and detergents described in Article 62, paragraph (2), of the Food Sanitation Act;
- (iii) Instruments for examination described in Article 21-2, paragraph (2), of the Fire Service Act and instruments subject to self-labeling described in Article 21-16-2 of this act;
- (iv) Poisonous and deleterious substances described in Article 2, paragraphs (1) and (2), of the Poisonous and Deleterious Substances Control Act, such as mercury, arsenic, or hydrogen cyanide;
- (v) Road trucking vehicles described in Article 2, paragraph (1), of the Road Trucking Vehicle Act;
- (vi) Containers described in Article 41 of the High Pressure Gas Safety Act;
- (vii) Hunting guns described in Article 2, paragraph (2), of the Ordnance Manufacturing Act; and
- (viii) Medicines, quasi-medicines, cosmetics, and medical equipment described in Article 2, paragraphs (1)–(4), of the Pharmaceutical Affairs Act.

PRACTICAL ISSUES IN CIVIL PROCEDURE

JURISDICTION AND GOVERNING LAW

When the domicile or principal business office of both parties is located in Japan, a Japanese court has proper jurisdiction over the litigation, regardless of whether the claim is based on breach of contract, tort, or the Act. As a matter of course, Japanese law governs the lawsuit.

When one party, which is generally the defendant, has no domicile or principal business office in Japan, the international jurisdiction and the governing law turn on the type of action.¹³

A Japanese court has proper jurisdiction in tort cases, including those pursuant to the Act, when the place of the tortious act was within Japan.¹⁴ This means that when either the wrongful act or the accident happened in Japan, a Japanese court generally has proper jurisdiction.

However, a Japanese court will not take jurisdiction over a case in which the wrongful act occurred in a foreign country and the occurrence of the result in Japan was ordinarily unforeseeable.

The governing law in product liability cases is ruled by Article 18 of the Act on General Rules for Application of Laws, which is a special provision of the governing law of tort cases. The article provides that the law governing the place where the products are delivered shall be the governing law. However, if the delivery of the product at this place was ordinarily unforeseeable, then the law of the manufacturer’s principal place of business shall govern. Usually, however, Japanese law will be the governing law when the accident happened in Japan.

Under the amended Code of Civil Procedure, a Japanese court has proper jurisdiction over breach-of-contract cases seeking performance or monetary damages where the agreed place for the performance is in Japan.¹⁵

In a breach-of-contract action, the contract generally specifies the governing law. If the parties did not agree on the governing law, then the governing law will be decided pursuant to Article 8 of the General Rules for Application of Laws. Pursuant to this article, in general, the law governing the place of business or residence of the party who delivered the goods shall be the governing law.

When a foreign manufacturer or retailer enters into a consumer contract, a Japanese court has proper jurisdiction if the domicile of the consumer was in Japan at the time of concluding the contract or is in Japan at the filing.¹⁶ Article 11 of the General Rules for Application of Laws provides rules of governing law on consumer contracts. When the consumer has manifested an intention to apply a specific mandatory provision from the law of the consumer’s domicile, this mandatory provision shall also apply to issues regarding the formation and effect of the consumer contract.¹⁷ Furthermore, in the absence of a choice of law with regard to the formation and effect of a consumer contract, the law of the consumer’s domicile governs those issues.

CLASS ACTION

The Code of Civil Procedure does not provide for so-called class actions. However, there are means for multiple plaintiffs to sue one or more defendants in a single case.

¹³ The Amended Code of Civil Procedure, which went into effect on April 1, 2012, describes the cases over which a Japanese court has proper jurisdiction.

¹⁴ “The place of the tortious act” includes the places where both the wrongful act and the result occurred. (Article 3-3, item (8), of the Code of Civil Procedure.)

¹⁵ Article 3-3, item (1), of the Code of Civil Procedure.

¹⁶ Article 3-4, paragraph (1), of the Code of Civil Procedure.

¹⁷ Article 11, paragraph (1), of the General Rules for Application of Laws.

Whenever a lawsuit raises rights or obligations that are common to two or more persons or are based on the same factual or statutory cause, these persons may sue or be sued as coparties.¹⁸ Thus, multiple plaintiffs can sue one or more defendants by filing a complaint as coparties in the case, such as when their claim is based on the same factual cause, like a manufacturing or warning defect.

When cases claiming common background facts and legal rights are filed in the same court, a party may petition the judge to consolidate the hearing and decision of the cases.

The Consumer Affairs Agency is contemplating a bill that would allow consumers to recover damages as a group. The agency has disclosed the outline, but the details are still not clear.

PRETRIAL DISCOVERY

The Code of Civil Procedure does not recognize “pretrial discovery procedure” as in the United States. The Code of Civil Procedure allows for the parties in civil cases to collect evidence from the other party or third parties through certain procedures.

In order to collect documents from the other party or third parties, a party must file with the court a “Petition for an Order to Submit Documents.” The petition must specify: (i) the title of the documents; (ii) the substance of the documents; (iii) the holder of the documents; (iv) the facts to be proved by the documents; and (v) the grounds for the obligation to produce the documents.¹⁹ While it is often difficult for the petitioner to identify the documents to be produced, judges are unlikely to approve “catch-all” language in a petition that does not specifically identify the requested documents.

A party cannot request the production of documents containing technical and professional secrets, nor documents prepared exclusively for internal use by the holder of the documents. Generally, attorney-client-privileged documents are included in this category.²⁰

The Code of Civil Procedure does allow a party to inquire of the adversary in writing and request a written response regarding matters necessary for preparing allegations or proof. Because the exceptions are broad, interrogatories are not frequently used, and not many questions are asked, even if used. Also, there are no concrete sanctions for failure to properly respond to a party’s inquiry. Compliance is predicated upon the principle and obligation of good faith and trust set forth in Article 2 of the Code of Civil Procedure.

A party may request the court to commission the holder of the documents to send the documents to the court. This device is typically used only against a third party that does not have any interest in the case and is reasonably expected to submit the documents voluntarily, since there is no sanction for failing to submit them.

It is possible to collect evidence under the Code of Civil Procedure before trial or even before filing a complaint. When a court finds that circumstances necessitate the examination of evidence in advance, it may conduct an examination of the evidence upon petition. However, this provision is rarely used in product liability cases.

PUNITIVE DAMAGES

No statutes or laws permit punitive damages in Japan. In fact, the Supreme Court in Japan dismissed a claim seeking enforcement of an American court’s judgment on punitive damages. The main reason for the dismissal is that a punitive damages award is offensive to Japanese public order and morals.

DURATION OF COURT DELIBERATION

In general, the time from the filing of a complaint to the decision of a district court (the first instance) is one to two years. However, in complex cases with many plaintiffs and complicated issues, decisions will take much longer.

CRIMINAL LIABILITY

GENERAL INFORMATION

The Act applies only to civil cases and does not provide any criminal penalties. When defective products cause the injury or death of another, the Penal Code can apply.

CAUSING DEATH OR INJURY THROUGH NEGLIGENCE IN THE PURSUIT OF SOCIAL ACTIVITIES—ARTICLE 211 OF THE PENAL CODE

Article 211 of the Penal Code provides:

A person who fails to exercise due care required in the pursuit of social activities and thereby causes the death or injury of another shall be punished by imprisonment with or without work for not more than 5 years or a fine of not more than 1,000,000 yen. The same shall apply to a person who, through gross negligence, causes the death or injury of another.

18 Article 38, paragraph (1), of the Code of Civil Procedure.

19 Article 221 of the Code of Civil Procedure.

20 See Article 220, paragraph (4), of the Code of Civil Procedure.

Article 211 of the Penal Code applies only to individuals and not to judicial persons such as companies. The facts will determine the persons within a corporation who can be criminally liable. However, the CEO is often deemed to be that person.

Article 211 applies when a person negligently fails to exercise due care and manufactures a defective product that subsequently causes death or injury to another. It also can apply when, despite having discovered the product defect, the person negligently fails to exercise due care to prevent an accident by the defective product, which then causes death or injury to another.

Article 211 of the Penal Code is not often applied to accidents caused by defective products, probably because of the difficulty in proving a person's negligence.

PRODUCT LIABILITY LAW IN MEXICO

Mexico follows a civil-law legal system. Under this system, liability is regulated in applicable statutes. Statutes are contained in civil codes or specific laws, on both the federal and local level. Depending on the specific fact pattern of a case, either federal or local statutes will apply. But for a few exceptions, local statutes either duplicate or follow the provisions of federal statutes. Thus, this overview of liability regulation discusses federal law.

CIVIL LIABILITY

THE FEDERAL CIVIL CODE

Theories

In Mexico, unlike under a common-law system, civil liability is regulated under the Federal Civil Code (*Código Civil Federal*). Civil liability can be either a contractual or an extra-contractual breach of law. Failure to comply with an applicable statutory provision of the Federal Civil Code will result in extra-contractual liability.

When dealing with extra-contractual liability, the Federal Civil Code adopted the theories of causation (*teoría de la causa*) and created risk (*responsabilidad objetiva*).

According to the causation theory, liability arises when a person who acts illicitly, or against good customs, causes damage to another. This type of liability requires a direct nexus between the action and the damage.

Under the created risk theory, liability may result from the use or handling of mechanisms, instruments, apparatuses, or dangerous substances causing damage.¹ This type of liability may arise without illicit conduct against good customs. Liability is premised on the inherent risk created by inherently harmful devices or substances.

An injury does not result in liability under either theory when the injured person acts with inexcusable fault or negligence.²

In synthesis, civil liability under the Federal Civil Code may derive only from: (i) breach of contract; or (ii) violation of a specific statutory provision under either: (a) the causation theory; or (b) the created risk theory.

Remedies

Only two remedies are available at the option of the injured person:

- (i) Restoration to the previous situation, when possible;³ or
- (ii) Payment of damages and losses.

Under the Federal Civil Code, there are no indirect, consequential, or punitive damages.

Damages must be the immediate and direct consequence of the wrongful act or omission. The amount depends on the type of damage to be repaired: (i) economic damages must be paid in total, including losses; (ii) physical injury damages should be assessed according to the Federal Labor Law (*Ley Federal del Trabajo*); and (iii) moral damages are determined by the court, considering the amount of damage, the degree of liability, the financial status of the offender and victim, and other applicable circumstances.

In light of the limited bases for liability, the Federal Civil Code does *not* recognize:

- (i) Liability distinctions among manufacturers, distributors, sellers, retailers, suppliers (including component and raw material suppliers), importers, and other participants in the chain of distribution;
- (ii) Tort negligence or strict liability as a source of product liability; and
- (iii) Liability for product design, manufacturing, sale, or distribution, absent an agreement.

1 Article 1913 of the Federal Civil Code.

2 Article 1910 of the Federal Civil Code.

3 Article 1915 of the Federal Civil Code.

Notwithstanding, there are statutes applicable to:

- (i) Products in general, including the Federal Consumer Protection Law (*Ley Federal de Protección al Consumidor*) and its Regulation (*Reglamento de la Ley Federal de Protección al Consumidor*);
- (ii) Specific sectors or industries;⁴ and
- (iii) Specific products or behavioral good practices.⁵

Following the civil-law system, failure to comply with these statutes will result in liability.

THE FEDERAL CONSUMER PROTECTION LAW

Protections Related to Products in General

The Federal Consumer Protection Law (the “FCPL”) was enacted with the purpose of promoting and protecting the rights of consumers and to seek fairness, assurance, and legal certainty in relations between suppliers and consumers.

In particular, the FCPL seeks, among many other things, to:

- (i) protect the life, health, and safety of consumers against risks caused by products, practices to supply products, and services considered dangerous or harmful; (ii) provide clear and adequate information on different products and services, with accurate specifications on their quantity, characteristics, composition, quality, and price, as well as on any risks they present; and (iii) effectively prevent and redress property damage and nonpecuniary damage, either individually or collectively.⁶

Thus, the FCPL contains provisions applicable to product information, advertising, and warranties. Their breach may give rise to liability and penalties.

The FCPL establishes that, with respect to products which are considered to present a potential danger for consumers, are harmful to the environment, or are foreseeably dangerous, suppliers shall include instructions to warn of the harmful characteristics by clearly explaining the recommended use or application as well as the potential risks of using the product other than as recommended.

Failure to comply makes the supplier liable for damage caused to consumers⁷ in addition to a right to a refund, which may not be less than 20 percent of the price paid for the product.⁸

The FCPL also establishes that the supplier is bound to deliver goods according to the terms and conditions offered or implicit in the advertising or information released, unless there is a covenant or consent in writing by the consumer disclaiming this obligation.⁹

When dealing with warranties, the FCPL provides that the warranties offered may not be less than the warranties determined by the applicable provisions to a specific product,¹⁰ nor may they stipulate conditions or limitations that diminish the rights legally conferred upon the consumer. The satisfaction of a warranty may be demanded from the producer, the distributor, and the importer of the good or service, except when a third party has assumed that obligation in writing.

Procedures

The FCPL protects consumers from suppliers, with the assistance of the Consumer Protection Agency (*Procuraduría Federal del Consumidor*). This government entity has the authority to promote and protect the rights and interests of the consumer and to procure fairness and legal safety in the relations between providers and consumers.¹¹

Under the FCPL, “suppliers” are defined as “individuals or entities in terms of the Federal Civil Code that regularly or periodically offer, distribute, sell, lease, or allow the use or enjoyment of goods and services.”¹²

Similarly, “consumers” are defined as “individuals or entities that acquire, consummate or enjoy, as final receivers, goods, products or services.” This definition includes the individual or entity that acquires, keeps, uses, or consumes goods or services with the purpose of incorporating them into other production or processes as provided in Articles 99 and 117 of the FCPL.

4 See, e.g., the General Health Law (*Ley General de Salud*), the General Law for Tobacco Control (*Ley General para el Control del Tabaco*), the Ecologic Equilibrium and Environment Protection General Law (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*), and the General Law of Professions (*Ley reglamentaria del artículo 5o. constitucional, relativo al ejercicio de las profesiones en el Distrito Federal*).

5 See, e.g., the Mexican Official Standards (*Normas Oficiales Mexicanas*) created under the Federal Measurement and Standardization Law (*Ley Federal sobre Metrología y Normalización*) and enacted to guarantee certain values, contents, labeling, designs, and means of production of goods and services. In brief, Mexican Official Standards comprise technical obligatory regulations issued by competent governmental agencies that provide rules, specifications, or prescriptions applicable to a product, process, installation, system, activity, service, or method of production or operation as well as those in relation to terminology, symbols, packaging, seals, or labeling.

6 Article 1 of the FCPL.

7 Damages will be measured in accordance with the corresponding provisions of the Federal Civil Code as described above.

8 Articles 41 and 92 *ter* of the FCPL.

9 Article 42 of the FCPL.

10 As determined by the corresponding Mexican Official Standard.

11 Article 20 of the FCPL.

12 Article 2 of the FCPL.

Defendants and claimants should carefully analyze whether to bind themselves to a conciliation or arbitration procedure.¹³

- (i) **Conciliation procedure:** In this stage, the parties will try to remedy their differences with the help of a conciliator. A hearing will take place at least four days after the supplier has been notified of a complaint by the Consumer Protection Agency. This hearing may be by telephone or by any other means of communication. The conciliator will provide a summary to the parties regarding the contents of the complaint and of the report given by the supplier. He will also provide several options to resolve the conflict. The conciliator may ask for evidence in regard to the complaint or the supplier's report. The conciliator may suspend the hearing up to three times, in which case another hearing will be set within 15 days.

The conciliator may also request an account statement to quantify the liquid amount of the contractual obligation. The account statement will constitute a nonnegotiable enforceable title in favor of the consumer. Provided that the contractual obligation contained in the title has been breached, the title will be liquid and enforceable.

If no agreement is reached, the parties may accept a subsequent stage called the "arbitration procedure." If the parties do not accept arbitration, they are free to proceed by other means, including civil litigation.

Conciliatory proceedings at the Consumer Protection Agency usually take six to eight months. The process is not binding for the parties; it is left to the good faith of the supplier to accept it. Nonetheless, this process is not a prerequisite for a consumer to file a civil lawsuit for damages.

- (ii) **Arbitration procedure:** The parties may decide to skip the conciliation procedure and enter into an arbitration procedure directly. The arbiter may be either the Consumer Protection Agency or another designated arbiter. In any case, the designated arbiter has to be registered before the Consumer Protection Agency.

The parties must determine whether the arbitration will be: (a) amicable arbitration (this model need not follow legal principles, the matter will be resolved in good faith, and there are no terms or duration for the process); or (b) strict legal arbitration. The final ruling is subject to

clarification (mere explanation of the ruling) within two days of receiving the ruling notification. This ruling will be enforceable 15 days after notice of the ruling.

In tandem, at the request of the consumers, or ex officio, the Consumer Protection Agency can initiate procedures for breaches of the law.

The Consumer Protection Agency has the authority to enforce such remedies as: (i) freezing the movement of containers, goods, products, and transports; (ii) securing goods or products; (iii) suspending commercialization of goods; (iv) recalling goods and products; (v) placing seals or warning information; (vi) ordering the suspension of advertisements; and (vii) ordering sanctions, such as warnings, fines, and use of the public force.¹⁴

PRODUCT RECALLS AND GOVERNMENT ADMINISTRATIVE INVESTIGATIONS OF PRODUCT DEFECTS

In Mexico, the Consumer Protection Agency and the Health Department have authority to order recalls and secure goods and products that may affect the life, health, and safety of consumers.

The Consumer Protection Agency can seize, secure, suspend, or recall goods and products and stamp warnings on them or order the suspension of any advertising related to such goods and products. These measures are determined according to internal criteria of the Consumer Protection Agency when the products do not fulfill the applicable legal requirements or when their advertisement is considered to be deceitful or abusive.¹⁵

In order to enforce the law, the Consumer Protection Agency may carry out surveillance and necessary verifications in establishments that manage, store, transport, or distribute products, merchandise, or services.¹⁶ The Consumer Protection Agency may examine products, merchandise, prices, quantities, and qualities. Finally, it can also confiscate products and enforce other preventive measures.

CRIMINAL LIABILITY

THEORIES AND STANDARDS

Criminal liability arises when conduct meets the requirements of a crime listed in an applicable statute. In order for a crime to exist, all of its elements must be met.

13 Arbitration proceedings are held before the Consumer Protection Agency when the goods or services do not exceed the equivalent of approximately US\$30,000.

14 Articles 25 and 25 *bis* of the FCPL.

15 Article 25 *bis* of the FCPL.

16 Article 96 of the FCPL.

The principle *indubio pro reo*¹⁷ governs the Mexican criminal system. Therefore, the prosecution must prove beyond a reasonable doubt that the accused is in fact guilty.

In Mexico, only individuals can commit crimes. Notwithstanding this fact, when a member, director, or manager of a corporation of any kind commits a crime, a judge may suspend or dissolve the corporation when the law allows such actions, taking into account the population's safety.¹⁸ Moreover, upon the occurrence of a crime, the judge may require a corporation to pay damages caused by its employees and managing directors.¹⁹

Unless different laws define specific forms of criminal negligence, negligence is considered an element of fault (*culpa*); the term is used in its adjectival form (*culposo/a*) to refer to crimes that are not willful or intentional. Only certain crimes specifically provided in law can be committed with fault. Fault (e.g., willful commission of a crime) is considered a factor for sentencing. The determination of a crime as manifesting fault is left to the judge's consideration.

In determining the degree of the fault for criminal purposes, judges are required to consider, among other things: (i) whether a duty was enforceable against the defendant, considering his personal circumstances; and (ii) whether he had time to act with thought and care.

Criminal conduct related to the sale and distribution of products is established by the Federal Criminal Code (*Código Penal Federal*) and other relevant statutes, such as the General Health Law.

Crimes under the Federal Criminal Code include:

- (i) **Fraud:** This crime is committed when a person, deceitfully or taking advantage of the error of others, illicitly obtains something or reaches an unlawful profit. The penalty for such crime ranges from three days to 12 years in prison and a fine of 30 to 120 days of the minimum-wage salary.²⁰
- (ii) **Dangerous technological activities:** A person who illicitly, without respect for prevention or safety measures, produces, transports, or performs any other

activity with dangerous substances or who causes damage to natural resources will be punished with imprisonment ranging from one to nine years and a fine of 300 to 3,000 days of the minimum-wage salary.²¹

Crimes under the General Health Law include:

- (i) A person who, without authorization and against the applicable Mexican Official Standards issued by the "health authorities" (as defined in the General Health Law), imports, possesses, cultivates, transports, or stores pathological agents that are dangerous to the public health will be punished with imprisonment that ranges from one to eight years and a fine that ranges from 100 to 2,000 days of the minimum-wage salary.²²
- (ii) A person who modifies, falsifies, contaminates, or allows the modification, falsification, or contamination of food, nonalcoholic beverages, alcoholic beverages, or any other product that may be consumed by humans, thereby creating a health risk, will be punished with imprisonment that ranges from one to nine years and a fine that ranges from 100 to 1,000 days of the minimum-wage salary.²³

CRIMINAL PROCEDURE

The criminal process starts when the public prosecutor (*Ministerio Público*) is informed of a claim that an alleged crime has occurred.²⁴ A claim can be made by: (i) any person (*denuncia*); or (ii) an injured party (*querrela*).²⁵

After filing the claim, the public prosecutor has the obligation to investigate the alleged crime and decide whether to pursue further action or cease the criminal process. If the public prosecutor considers that enough evidence exists to continue the prosecution, a criminal trial follows.²⁶

The statute of limitations for a criminal legal action will start on the date the crime was committed and will run for a legal term that consists of the average of the corresponding minimum and maximum time of imprisonment applicable for the crime, but never less than three years.

17 The Latin phrase for "when in doubt, for the accused" means that a defendant may not be convicted by the court when doubt about his or her guilt remains.

18 Article 11 of the Federal Criminal Code.

19 Article 32 of the Federal Criminal Code.

20 Article 386 of the Federal Criminal Code.

21 Article 414 of the Federal Criminal Code.

22 Article 455 of the General Health Law.

23 Article 464 of the General Health Law.

24 Article 118 of the Federal Criminal Procedure Code.

25 It may also start at the sole instance of the public prosecutor.

26 Article 168 of the Federal Criminal Procedure Code.

DEFENSES

Defenses (*excluyentes de responsabilidad*) available in a criminal process include those in which the crime:

- (i) Was committed by a minor (less than 18 years of age);
- (ii) Was committed by a mentally unfit person;
- (iii) Was committed in self-defense;
- (iv) Was committed with the victim's tacit or express consent;
- (v) Lacks one of the legal elements of a crime; or
- (vi) Was committed as a result of a legal obligation or due to the exercise of a legal right.²⁷

PRACTICAL ADVICE

Several issues should be taken into consideration when dealing with a product liability case in Mexico:

- (i) It is important to be aware of the statutes of limitation. In Mexico, statutes of limitation will vary according to the nature of the liability (e.g., contractual or extra-contractual, criminal or civil).
- (ii) Proof is a challenging, and sometimes daunting, task under Mexican law. The Mexican legal system lacks pretrial proceedings and discovery. In order to bring a claim, the claimant must identify all available evidence. Evidence must be mentioned in the claim itself, unless the claimant can prove lack of knowledge of its existence at the moment of filing the claim (supervening evidence). Since direct and immediate damage or loss needs to be proved, the nexus between the act or omission and the damage or loss needs to be established with relevant evidence. Gathering documentary evidence is important.

- (iii) It is necessary to obtain a deed of facts before a public notary regarding the condition of the product to file as evidence before the relevant court.
- (iv) The attorney-client privilege does not exist in Mexico. Under Mexican law, a judicial order or law may request the disclosure of documents that other jurisdictions would consider to be protected under the attorney-client privilege. It is always advisable to execute confidentiality agreements. Confidentiality obligations are binding only when the parties agree or when the law provides. In the event that the parties agree to confidentiality obligations, failure to comply will entitle the affected party to claim damages. Some statutory confidentiality obligations are contained in criminal, labor, and industrial property statutes; however, none of these confers the right of privilege to the client.
- (v) A thorough review and analysis of the laws and regulations applicable to specific products must be made. This includes the applicable Mexican Official Standards regarding the value, content, labeling, design, and manufacturing requirements for the product at issue.

²⁷ Articles 15 through 17 of the Federal Criminal Code.

PRODUCT LIABILITY LAW IN THE UNITED STATES

“Product liability” in U.S. law refers to a combination of state tort law, state contract law, state statutes, and federal consumer product safety law. It is rooted primarily in state tort law, meaning that it differs from state to state and is primarily judge-made. There is no uniform federal product liability common law or statute.

This chapter will discuss the sources of U.S. product liability law and analyze the different civil and criminal theories under which a product manufacturer, distributor, or retailer can be held liable. The role of the state and federal governments in administrative investigations and recalls will also be discussed, followed by special topics in U.S. law. The chapter will conclude by offering practical pointers for businesses involved in product liability litigation.

SOURCES OF U.S. PRODUCT LIABILITY LAW

STATE LAW

Most product liability claims are state-law claims, governed by the substantive law of one of the 50 states. They are grounded predominantly in judge-made common law, which varies from jurisdiction to jurisdiction. However, although the details of the law vary, general concepts are observed among states. This chapter will focus on those general concepts.¹

In addition, many states have statutes that supplement the common law. These statutes address both general topics, such as rules about how money damages may be assessed against or among tortfeasors, as well as specific topics, such as the procedural or substantive rules that govern specific types of cases.

One example of an important state statute is the Uniform Commercial Code (the “U.C.C.”), which all 50 states have adopted (with minor variations) and which harmonizes state law of contracts for the sale of goods. Product liability suits alleging theories of breach of warranties invoke U.C.C. rules. Another important source of state statutory law is state consumer protection laws, which plaintiffs frequently invoke to make allegations of deceptive advertising. These

laws provide both strong protection and powerful remedies for consumers.

FEDERAL LAW

The only federal product liability law is statutory. The Consumer Product Safety Act (the “CPSA” or the “Act”) creates and gives power to the Consumer Product Safety Commission (the “CPSC”).² The CPSC has a range of responsibilities regarding the investigation and recall of defective products. The CPSA also gives private individuals the right to sue product sellers who violate the Act. The Consumer Product Safety Improvement Act also gives enforcement powers to state attorneys general. 15 U.S.C. § 2073.

LIABILITY OF SELLERS

CIVIL LIABILITY

Theories of Liability

A plaintiff may sue the manufacturer or seller of a defective product under one or more theories of liability, any of which can be the basis for an award of damages. While these theories often overlap, subtle differences between the causes of action may make some more applicable than others in particular contexts. Although a plaintiff can

1 This chapter frequently cites the American Law Institute’s “Restatements of the Law,” scholarly volumes that set forth general principles of common law. The American Law Institute (“ALI”) is a nongovernmental organization of judges, scholars, and practicing attorneys. The Restatements are not the law in any state, but they may be thought of as the law of the “typical” state. Annotations in the Restatement volumes explain how individual states apply these general principles or diverge from the norm. The ALI first addressed product liability in the Restatement (Second) of Torts in 1964; developments in the law in the following decades caused the ALI to publish a new, more detailed Restatement (Third) of Torts—Products Liability in 1997.

There is some concern among academics and practitioners that in some areas of the law, particularly in product liability, the ALI is more concerned with “moving” the law in a particular direction than “restating” it. Nevertheless, the Restatement rules, in particular Restatement (Second) of Torts § 402A, have been highly influential in state product liability jurisprudence, with many state courts explicitly citing and adopting them as the law.

2 See 15 U.S.C. §§ 2051–2084.

recover only once for any given injury, plaintiffs' attorneys will frequently invoke all possibly applicable theories in order to increase the chances of recovery.

Strict liability. The primary type of product liability lawsuit is an action brought under the theory of "strict liability," or liability without fault. Generally, a seller or manufacturer is liable for any product that is in a "defective condition unreasonably dangerous to the user or consumer" and causes physical harm to the user or consumer.³ The seller of a defective product is held liable for all injuries caused by the defect, regardless of the seller's diligence in designing and manufacturing the product.

Seller. Any "seller" of a "product" may be held liable in a product liability action. "Product" includes any tangible personal property, unless specifically exempted by state or federal statutory law. "Seller" is a term of art and encompasses anyone in the business of selling a product, broadly construed: the term includes the entire supply chain, from manufacturer to distributor to retailer. Furthermore, the product does not have to be the primary focus of a seller's business; a movie theater, for example, could be held liable for selling defective popcorn.⁴ As a result of this broad definition of "seller," indemnity agreements are a critical part of any relationship between manufacturers, vendors, and retailers.

Raw material or component suppliers may also be considered "sellers" for the purposes of strict product liability. Their liability is limited to cases in which either: (i) the component or raw material is the source of the defect; or (ii) the component supplier "substantially participates" in the process of integrating the component into the larger product, and the defect arises from some aspect of the integration.⁵

A "seller" can also include successors to a previous seller. There are three general cases in which a successor company will inherit liability from a predecessor's products: (i) a successor that acquires a predecessor's assets agrees to assume its liabilities; (ii) a successor is a "continuation" of the predecessor, either through a merger or consolidation, continuity of shareholders, officers, and directors, or a continuation of the product line in which the defect arises; or (iii) the successor company exists as the result of a fraudulent or otherwise illegal attempt by the predecessor to escape liability. State laws vary on successor liability.

Defective condition. A seller can be held liable for any product in a "defective condition," which means that it is "unreasonably dangerous"⁶ (or "not reasonably safe"⁷) for its intended use, or any reasonably foreseeable uses, as of the time of sale. Products can be defective in one of three ways: (i) manufacturing defects; (ii) design defects; and (iii) warning defects.

(i) Manufacturing defects

"Manufacturing defects" are product defects that exist when a product diverges from the manufacturer's own specifications for the product, making one particular product or batch unreasonably dangerous. Generally, whether a product is "unreasonably dangerous" is determined with respect to consumer expectations: whether the product was dangerous in a way that a reasonable consumer would not expect. Because the manufacturer's fault is irrelevant in strict liability, evidence of thorough quality control and testing will not relieve the seller of liability for a manufacturing defect.

(ii) Design defects

A "design defect" is one in which the unreasonably dangerous element inheres in the entire product line. A plaintiff bringing a design defect claim must prove that the product performing as specified creates unreasonable risks, according to one or both of two different tests, depending on the jurisdiction.

The more modern and more commonly applied test is the "risk-utility" test, in which a product is deemed unreasonably dangerous if its risks outweigh its benefits to consumers. In most jurisdictions, a plaintiff will have to prove that a *reasonable alternative design* was available at the time of sale of the product that would have reduced the risk of the product without proportionally reducing its usefulness. Because evaluating the trade-offs of a design frequently involves complex questions of engineering and economics, expert testimony is crucial for the successful prosecution or defense of design defect claims.

The second, less common test for proving a defective design is the "consumer expectations" test. A product can be found defective if its design makes it dangerous in a way that an ordinary consumer would not expect.

(iii) Warning defects

"Warning defects," or "failure to warn" claims, are defects consisting of inadequate or misleading labeling or instruction. Many useful products—from tools to medicines to

3 Restatement (Second) of Torts, § 402A.

4 Restatement (Third) of Torts—Products Liability, § 1 cmt. c.

5 Restatement (Third) of Torts—Products Liability § 5.

6 Restatement (Second) of Torts § 402A.

7 Restatement (Third) of Torts—Products Liability § 2.

cars—carry inherent risks. Even if not designed defectively under the risk-utility test, these products may still be considered “not reasonably safe” if the consumer is not provided with adequate warning about the risks. Whether a warning is “adequate” for a given product is a fact-sensitive inquiry and will depend on the target user, the obviousness of the risk, and the likelihood that additional or more detailed warnings would actually increase the safety of the product.

The plaintiff must prove that the inadequate warning *caused* his or her injury—in other words, that additional warnings would have *altered* his or her behavior. Juries are generally instructed to presume that warnings will be read and heeded, absent contrary evidence. Thus, the plaintiff’s statements can be critical: on a claim for failure to warn, a plaintiff who admits to not reading prominent warnings that already existed on the product is admitting that a different warning would not have prevented his or her injury.

Injury. The third element of a product liability claim is an injury or property damage. In most jurisdictions, this includes harm to a person or to property *other than* the product itself.

Who is a proper plaintiff with the right to sue varies by jurisdiction. In some jurisdictions, a plaintiff must have been at least a “passive user” of the defective product (e.g., a passenger in a defective vehicle). In other jurisdictions, courts follow the more expansive rule that bystanders injured as a result of the defective product have a legal right to sue (e.g., a pedestrian struck by a defective vehicle).

Causation. The final element of a product liability claim, other than proof of the amount of damages, is causation. The defect must be the *actual* and *proximate* cause of the injury or property damage. “Actual causation” means that the defect must be a literal, “but-for” cause of the harm. “Proximate causation” means that the defect must be a sufficiently direct cause of the harm and not too remote because of unforeseeable, intervening, or superseding events.⁸

Causation is a critical and frequently disputed aspect of product liability lawsuits. In particular, a standard defense in product liability suits is that the plaintiff or a third party

misused or modified the product in such a way as to break the “causal chain” that led to the injury.

Hotly disputed issues of causation arise in “toxic torts,” in which a plaintiff alleges that a chemical caused his or her injury. To succeed, the plaintiff must prove that the chemical actually caused the injury; the fact that a plaintiff was exposed to a particular chemical and later developed a disease does not necessarily mean that the chemical caused the disease. Complex issues of medical knowledge, epidemiology, toxicology, and statistical analysis frequently arise in these cases, making expert witnesses essential.

Furthermore, when multiple companies have produced a generic pharmaceutical or other fungible chemical, there is sometimes no way to prove or disprove which manufacturer was the source of the chemical that injured the plaintiff. Although these cases would be resolved in the defendant’s favor under standard causation principles, some state courts have developed a range of causal theories—such as alternative liability, concert of action, market-share liability, enterprise liability, and risk-contribution theory—to allow these suits to go forward. The theories used in particular jurisdictions vary widely.

Negligence. Negligence claims are the most common type of tort suit in the United States outside the product liability field, and negligence claims can arise in the product liability context as well. Negligence is a fault-based theory: in order to recover for negligence, a plaintiff must prove that a defendant owed a “duty” to the plaintiff—a minimum standard of conduct recognized by the law—as well as the defendant’s “breach” of that duty. The plaintiff must then show that the breach of duty actually and proximately caused his or her injury.⁹

In standard negligence suits, the duty of the manufacturer or seller is to act as a reasonable person would act in the circumstances. In product liability law, there are a variety of special duties, which can vary among jurisdictions. In general, a manufacturer has a duty to design a product with reasonable care, to perform reasonable testing on the product, to manufacture the product with reasonable quality control, and to attach reasonable warnings and instructions to the product.¹⁰ Companies are frequently

8 There is a subset of product liability claims called “crashworthiness claims.” In these suits, the defect is alleged to have increased the severity of the plaintiff’s injury, though the defect did not cause the accident. For example, a plaintiff injured in a car accident might sue the car manufacturer, alleging that his or her injuries would not have been as severe absent a defect in the car’s seatbelt. Causation principles remain the same, but the plaintiff’s goal is to show that the defect *increased* the injury’s severity.

9 Often, plaintiffs will attempt to show the breach of a duty through a theory called “*res ipsa loquitur*,” or “the thing speaks for itself.” *Res ipsa loquitur* is used in cases in which it is impossible to prove negligence by direct evidence; when an event occurs that ordinarily does not occur unless a party has been negligent, the jury is allowed to assume that a duty has been breached. Although this doctrine lessens the plaintiff’s burden of proving breach of duty, the plaintiff must still prove injury causation.

10 In addition, some state courts impose a post-sale duty to warn of new defects that come to light and, in limited circumstances, a duty to recall a product. However, for the most part, federal regulations govern these particular issues.

judged in relation to industry standard or custom. Failure to comply with a particular industry standard or custom is strong evidence that the company acted unreasonably and, therefore, negligently. Similarly, compliance with industry standard or custom is strong evidence that a defendant has not breached the required standard of care.¹¹

Breach of warranty. Breach-of-warranty cases are actually breach-of-contract claims, not tort claims. The plaintiff in a breach-of-warranty claim alleges that the seller made and breached a promise regarding the product and that this breach caused an injury to the plaintiff. Suits can be based on breaches of either express or implied promises; showing a “defect” is not necessary. Normally, a claim for breach of warranty is limited to a product purchaser or third-party beneficiaries of warranties—usually persons who may be reasonably expected to use a product even if they were not the actual purchasers.¹² Although warranty cases are based in contract law, privity of contract is not always necessary to sustain an action for breach of warranty. A manufacturer may be bound by a warranty created by a communication with the purchaser—via an advertisement or a writing included with the product—even if the purchaser buys the product from an intermediate retailer.¹³

Express warranties. An “express warranty” is any representation made by a seller regarding a product’s quality or condition. For an express warranty to attach to a sale, the representation must be an actual promise (and not merely a statement of opinion or “puffing”), and the buyer must be aware of and rely on the representation in purchasing the product. If the product does not perform as promised and this failure injures the purchaser, the buyer will have a claim for breach of warranty.

Implied warranties. “Implied warranties” are promises that the law implies in the terms of a transaction and that the seller need not expressly state to be binding. There are two types: implied warranties of merchantability and implied warranties of fitness for a particular purpose.

Implied warranties of merchantability are implied promises that the product is fit for its ordinary purposes, including

guarantees that it will “pass without objection” under its description, be of “fair average quality,” and be adequately packaged and labeled.¹⁴ While the seller may disclaim warranties, some jurisdictions make it illegal to disclaim an implied warranty of merchantability.¹⁵

The implied warranty of fitness holds that an item is fit for the buyer’s *specific* purpose.¹⁶ For an implied warranty of fitness to attach to a sale, the seller must know or have reason to know of the buyer’s particular purpose and the buyer’s reliance on the seller’s judgment in selecting an appropriate product.

Fraud and misrepresentation. A person can be held liable in tort for a false statement, but only if he or she knows, or has reason to know, that the statement is false. Plaintiffs in product liability cases, however, may not have to prove such knowledge to recover on the basis of a false statement. Actions for *misrepresentation* generally require only that the seller, through advertising or labeling, makes (i) to the public (ii) a misrepresentation of (iii) a material fact (i.e., one that would cause a reasonable person to rely upon it) about (iv) the product’s character or quality. The seller may then be held liable for (v) any physical harm to the plaintiff (vi) caused by reliance on the misrepresentation.

Although similar to actions for breach of express warranties, breach-of-warranty actions usually involve private promises, whereas misrepresentation actions are often used to impose liability for public advertisements. Misrepresentation actions, like breach-of-warranty actions, do not require proof of a product defect; a plaintiff who can prove harm resulting from a misleading advertisement need not prove that the product is unreasonably dangerous.

Unfair or deceptive trade practices. Most states have consumer protection laws that prohibit any “unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹⁷ An “unfair or deceptive practice” is any business practice that is likely to mislead a reasonable consumer to that consumer’s detriment, or any business practice that is “immoral, unethical, oppressive, unscrupulous, unconscionable, or unfair.”

11 In contrast, a manufacturer or seller may typically not rely on compliance with an industry standard to prove that its product is not defective, though a plaintiff can use noncompliance to prove a product defect.

12 U.C.C. § 2-318.

13 See U.C.C. §§ 2-313A, 2-313B.

14 U.C.C. § 2-314.

15 The factual inquiry in claims for breach of implied warranty of merchantability overlaps significantly with that of product defect claims. As a result, strict liability and breach-of-implied-warranty actions are frequently brought together; in particular factual circumstances, it is possible for a product to be found “unfit” for ordinary uses but not “unreasonably dangerous.” Although a plaintiff cannot recover twice simply by using two theories of liability, the two types of claims may differ in the availability of insurance coverage.

16 U.C.C. § 2-315.

17 These statutes are usually based on Section 5 of the Federal Trade Commission (“FTC”) Act, 15 U.S.C. § 45, but the FTC generally does not focus on product liability issues.

pulous, or substantially injurious to consumers.”¹⁸ As the broad language implies, these state laws can be employed in a wide range of circumstances.

Like actions for misrepresentation, unfair or deceptive trade practice actions are frequently used to attack allegedly misleading product advertisements. Consumer protection laws typically allow plaintiffs special forms of relief—such as increased or multiplied damages for willful behavior—that are unavailable in standard product liability actions, and they are therefore favored by plaintiffs’ attorneys.

Violation of consumer product safety rules. Federal law also provides an avenue for personal product liability claims. The federal Consumer Product Safety Commission has the power to promulgate federal safety rules and standards for consumer products. In standard strict liability claims, violation of a consumer product safety standard can be very strong (although not usually conclusive) evidence of a product defect. However, the Consumer Product Safety Act also allows a private individual injured by a knowing violation of a consumer product safety rule to sue the manufacturer for damages in federal or state court. The individual, if successful, may recover attorneys’ fees from the defendant, which U.S. law rarely allows.¹⁹ Furthermore, the Act allows state attorneys general to file suit in federal court on behalf of state residents in order to remedy violations of the CPSA.²⁰

Defenses

Alteration and misuse. Defendants in product liability actions will frequently argue that the user altered, modified, or misused the product. These arguments are not defenses in themselves, but instead are strategies for rebutting one of three elements of product liability suits: (i) defect; (ii) causation; or (iii) fault (in negligence actions only).

In negligence actions, product alteration or misuse can be used to show contributory fault on the part of the plaintiff or a third party. To the extent to which a seller can convince a jury that the modification made the product more dangerous, or that the plaintiff was at fault (for example, intoxicated) while using the product, the seller can show that the plaintiff or a negligent third party is solely or partly to blame for the plaintiff’s injury. This strategy will not always shield a seller from liability altogether; if the plaintiff is only partly to blame, then the seller may also be partly to blame and, therefore, still partly liable.²¹

Product alteration or misuse is used in strict liability actions to show either the absence of a defect or a lack of causation. A product is defective only if the defect exists at the time of sale, so defects created by user modification after sale are not the seller’s responsibility. In addition, while a product must be safe for reasonably foreseeable uses and misuses, a product that is dangerous only as the result of *gross* or *idiosyncratic* misuse is, by definition, not defective.

Even if a product were found to be defective, however, gross misuse may still defeat causation. In order to succeed on a defect claim, a plaintiff must prove that it is more likely than not that the defect caused the injury. If a plaintiff is injured while intoxicated, for example, a jury may find that the plaintiff’s intoxication, not the product, caused the injury.

Assumption of risk. Some states apply the doctrine of assumption of risk to product liability. To prove this defense, the defendant must show that the plaintiff: (i) knew of a risk from the product; (ii) voluntarily proceeded to act in the face of that risk; and (iii) sustained harm as a result of the known risk. A plaintiff who voluntarily used a product knowing of its risk is deemed to have caused his or her own injury.

Comparative fault and comparative responsibility.

In negligence actions, fault is apportioned among all blameworthy parties, who then bear the burden of the plaintiff’s injuries in proportion to their fault. Any alteration, misuse, assumption of risk, or negligence on the part of the plaintiff or a third party will reduce the seller’s comparative fault for the injury and proportionally reduce its liability.

The doctrine of comparative fault becomes more complicated in strict liability actions, where the defendant’s fault is immaterial to its liability. How can a court apportion “fault” in an action not based on fault? In many jurisdictions, it does not; the court will assign damages in an “all or nothing” fashion, depending on whether defect and causation are proven. However, many other jurisdictions apportion damages on a theory of comparative *responsibility*, as opposed to comparative *fault*. In these jurisdictions, the plaintiff’s negligence may offset strict liability based on how “responsible” each party is for the injury.²²

18 See *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 (7th Cir. 1976).

19 15 U.S.C. § 2072.

20 15 U.S.C. § 2073.

21 Some jurisdictions have statutes that allow a plaintiff to collect damages only if the plaintiff is found to be less than 50 percent at fault.

22 The difference between these two approaches may blur when dealing with the negligence of third parties. If a jury were to find both a product seller and a third party jointly liable, even some jurisdictions that do not allow the plaintiff’s negligence to offset the plaintiff’s recovery may still divide the judgment between the seller and the negligent third party.

Federal preemption of state law. The doctrine of preemption is an important defense and a major topic of dispute in certain fields of product liability litigation. Under the U.S. Constitution, a state law is void if it conflicts with a valid federal law. Preemption can happen in one of three ways: (i) the U.S. Congress can pass a law explicitly preempting all state law on a subject; (ii) Congress can regulate a field so comprehensively that there is no room for state law to operate; or (iii) a state law can conflict with federal law by creating either a logical or practical obstacle to the enforcement of federal law.

Courts are reluctant to find state tort law preempted, and the major product liability preemption cases have focused mostly on a few specific areas. One such area is transportation safety; for example, the National Traffic and Motor Vehicle Safety Act,²³ which includes federal standards for auto safety, may preempt design defect claims for a manufacturer's choice of safety devices, as long as allowing the manufacturer to have a choice is an important safety objective of the federal standards.²⁴ Another major source of federal preemption is the Food, Drug, and Cosmetic Act (the "FDCA").²⁵ There is a complex and growing body of law surrounding the preemption of state law actions regarding the production, labeling, and marketing of drugs and medical devices.²⁶

Statutes of limitation and statutes of repose. Each state has statutes of limitation and repose that impose hard deadlines on a plaintiff's ability to file a lawsuit. A plaintiff may not bring a lawsuit after the running of the applicable statute. The statute of limitations clock (usually only about two years) typically starts running when a person "discovers" the claim—when he or she knows or reasonably should know both that he or she has been injured and that his or her injury was the result of a seller's negligence or product defect.

The statute of repose (often a longer term, such as 10 or more years) requires a plaintiff to bring a claim within a certain time from the date of *sale* (as opposed to the date of discovery of injury). However, most state statutes of repose apply only to building design and construction, so the statute of repose covers only products that are permanent fixtures in a building.

Damages

Compensatory damages. The basic measure of damages in tort suits is *compensatory damages*—the amount of money that it takes to make the plaintiff "whole." Damages can include a range of expenses, including the plaintiff's economic loss, past and future medical expenses, lost past and future wages, and—most notoriously—pain and suffering. Unless capped by a statute or reduced by a court for being excessive as a matter of law, there are few limits on a jury's award of pain and suffering damages. Spouses of injured persons may also recover for loss of consortium and loss of services.

Furthermore, most jurisdictions use the "collateral source rule" in calculating damages. This rule means that other payments to the plaintiff, such as insurance payments, disability payments, or other forms of reimbursement for an injury or property damage, are *not* set off from a verdict against the defendant. The policy behind the collateral source rule is that a tortfeasor should not be able to avoid liability by virtue of the plaintiff's foresight to have insurance.²⁷

Punitive damages. In certain cases, a jury may also award punitive damages when necessary to punish the tortfeasor and deter repetition of the tortious conduct. To award punitive damages, the jury must find that the defendant acted with malice, willfully or intentionally sold a defective product, or acted in reckless disregard of consumer safety.

Punitive damages are a controversial topic in U.S. civil litigation. In some high-profile suits, juries have awarded enormous punitive damages to punish large corporations, leading to massive windfalls for individual plaintiffs and their attorneys. In the last two decades, however, the U.S. Supreme Court has issued several opinions limiting punitive damages awards, finding that excessive awards violate the U.S. Constitution.²⁸

Reform of punitive damages is a major policy issue in states that enact tort reform legislation. In Georgia, for example, juries may impose punitive damages in product liability suits, but punitive damages may be imposed only once for any given product, and 75 percent of any punitive

23 49 U.S.C. § 30101 *et seq.*

24 *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). *But see Williamson v. Mazda Motor of Am.*, 131 S. Ct. 1131 (2011) (finding no preemption when choice allowed by federal law is not a "significant regulatory objective").

25 21 U.S.C. § 301 *et seq.*

26 See, e.g., *Pliva v. Mensing*, 131 S. Ct. 2567 (2011); *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008). One area in which preemption frequently occurs is the regulation of medical devices. The Medical Device Amendments to the FDCA explicitly prohibit states from enacting medical device regulations that are "different from, or in addition to" federal law. 21 U.S.C. § 360k(a).

27 Although this rule raises the possibility of "double recovery" for the plaintiff, most insurance policies give insurers reimbursement or subrogation rights that allow them to recoup their payments from the proceeds of any damages award. This is true for the federal government as well, when it acts as an insurer under the Medicare Act. 42 U.S.C. § 1395y(b).

28 See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North Am. v. Gore*, 517 U.S. 559 (1996).

damages award is paid directly to the state treasury instead of the plaintiff.²⁹

Joint and several liability. When multiple defendants are found to be responsible for the plaintiff's injury, the court must decide whether the defendants are "joint tortfeasors." Two or more defendants are considered joint tortfeasors if their actions combine into a single injury, regardless of whether they acted together or independently. In contrast, if the defendants' actions cause "distinct and separate" injuries such that a court can determine which injuries are attributable to which party, then the defendants are not joint tortfeasors.

When multiple defendants are found to be joint tortfeasors, they can be held *jointly and severally liable* for the injury. "Joint liability" means that the plaintiff can recover from *any* defendant the *full amount* of the judgment. "Several liability" means that a defendant who pays more than its allotted share of the judgment can seek *contribution* from the other defendants or third parties for their shares. For example, if a jury were to divide liability evenly between a product seller and a third party, the plaintiff may choose to recover the full amount of the judgment from the "deep pockets" of the seller, leaving the burden on the seller to collect contribution from the third party. In some states, however, tort reform statutes have modified or eliminated joint and several liability, permitting a plaintiff to recover damages from a defendant based only on its assessed share of fault.³⁰

CRIMINAL LIABILITY

State Law

Criminal law has not traditionally been used in the product liability context. States rarely, if ever, prosecute corporations or their officers or directors for selling defective products that cause injury or death. Prosecution of corporate principals for such sales is theoretically possible if the requisite state of mind exists (usually some form of willfulness, recklessness, or disregard for human safety), but these types of actions are rarely seen. States instead rely on the tort system and punitive damages to deter and punish corporate wrongdoers.

Federal Law

Federal law does provide for criminal sanctions in limited cases. The Consumer Product Safety Act provides criminal penalties for certain violations, including failing to provide requested information to the Consumer Product Safety Commission regarding defective products, failing to comply with federal product safety rules, or making misrepresentations to the CPSC regarding a product's safety. An officer, director, or agent of a corporation who "knowingly and willfully" authorizes any of these types of conduct may be subject to criminal fines or even imprisonment.³¹ However, given the egregious level of behavior needed to sustain a prosecution under these provisions, criminal liability is rarely imposed.³²

More common, however, are civil penalties, which can be imposed for violations of the CPSCA without the finding of willfulness required to sustain a criminal prosecution.³³ Between 2001 and 2008, the CPSC assessed an average of \$4.9 million annually in civil penalties, with an average penalty of approximately \$470,000.³⁴ The Congressional Budget Office has estimated that 2008 amendments to the law that increased the allowed penalties will raise revenues by as much as \$8 million per year by 2018.³⁵

GOVERNMENT ADMINISTRATIVE INVESTIGATIONS OF PRODUCT DEFECTS AND PRODUCT RECALLS

PRODUCT INVESTIGATION AND RECALLS UNDER STATE LAW

Product investigations and recalls are usually within the province of the federal government, but state consumer protection agencies or state attorneys general may also have jurisdiction. Product investigations and recalls often involve federal and state authorities. In addition, an increasing number of states recognize a post-sale duty to warn consumers of product risks that come to a seller's attention when such warnings are feasible. Similarly, some jurisdictions recognize a duty to recall dangerous products when there is a substantial risk of harm. This

29 Ga. Code Ann. § 51-12-5.1(e).

30 See, e.g., Colo. Rev. Stat. § 13-21-111.5; Miss. Code Ann. § 85-5-7; Vt. Stat. Ann. tit. 12, § 1036. Another common modification of joint and several liability rules is to permit full recovery only from a defendant who is more than 50 percent responsible for the injury, so that defendants who are 50 percent or less responsible for the injury cannot be forced to satisfy the full judgment. See, e.g., N.Y. C.P.L.R. 1601.

31 15 U.S.C. §§ 2068, 2070.

32 See, e.g., Press Release, U.S. Consumer Product Safety Commission, California Company Pleads Guilty To Importing and Selling Dangerous Children's Toys (Nov. 11, 2002), available at <http://www.cpsc.gov/CPSC/PUB/PREREL/prhtml03/03033.html> (announcing criminal penalties imposed upon repeat offender that imported and sold recalled children's toys); Press Release, U.S. Consumer Product Safety Commission, Ohio Company Sentenced for Selling Recalled Toys (Sept. 29, 1999), available at <http://www.cpsc.gov/CPSC/PUB/PREREL/PRHTML99/99176.html> (same) (web sites last visited August 23, 2012).

33 15 U.S.C. §§ 2068–2069.

34 Congressional Budget Office, Cost Estimate Summary for H.R. 4040 Consumer Product Safety Improvement Act of 2008 (Aug. 8, 2008).

35 *Id.* For a more detailed analysis of the effect of the 2008 amendments on product manufacturers, see Peter J. Biersteker, *Pass the Toy and Hold the Lead: Implementing the Consumer Product Safety Improvement Act of 2008*, ABA Trends, Jan.–Feb. 2009.

duty can include the responsibility to act reasonably both in notifying customers of the recall and in conducting the recall. A seller who breaches one of these duties can be held liable in a negligence action.

PRODUCT INVESTIGATION AND RECALLS UNDER FEDERAL LAW

Primary responsibility for the investigation of product defects and for overseeing the recall of defective products lies with the federal Consumer Product Safety Commission. The CPSC has a range of responsibilities under federal law.³⁶

The CPSC has promulgated consumer product safety standards. The violation of a standard can serve as the basis for individual product liability actions.

The CPSC has the authority to investigate potential product defects, collect documents and information from product manufacturers or sellers, conduct its own product testing, and publish information regarding the safety of consumer products. The CPSC also may act to prevent injury from “substantial product hazards,” defined as any product that either: (i) fails to comply with an applicable consumer product safety standard; or (ii) has a defect that creates a “substantial risk of injury to the public.”³⁷ All product manufacturers, distributors, and retailers have a duty to notify the CPSC promptly when they have any information that “reasonably supports the conclusion” that a product contains a substantial product hazard.

When the CPSC learns of a substantial product hazard, it may order the seller, after conducting a hearing, either to give public notice of the product defect, to mail notice to distributors and retailers for publication, or to mail notice directly to known purchasers of the product. It may also require a seller to repair, replace, or refund all instances of the product sold or even order the manufacturer to recall the product and prohibit further sale of the product.

A seller’s failure to comply with any CPSC orders or to cooperate with a CPSC investigation can be grounds for civil or criminal penalties. A corporate officer or director who knowingly or willfully violates a CPSC order can be subject to criminal fines or imprisonment. However, to

exercise its power to order a recall, the CPSC must make a determination based on the record at an official hearing; the results of these administrative hearings can be challenged in federal court under the Administrative Procedure Act.³⁸ Most product recalls are negotiated with the CPSC’s staff and done “voluntarily” without a CPSC order and determination of a substantial product hazard.

SPECIAL TOPICS IN U.S. LAW

CLASS ACTIONS

Plaintiffs in the United States can take advantage of the class action form of civil action, whether in a federal or state court. Class actions are a method of aggregating the claims of numerous individuals with similar claims, so that the rights and liabilities of all parties involved may be adjudicated in one proceeding.

Class actions seeking damages for defective products are typically an “opt-out” system: the plaintiffs’ attorney need only name one class representative and provide reasonable notice of the suit to all potential class members. Unless a notified person responds with notice to opt out of the lawsuit, every class member will be considered part of the action and be barred from bringing further individual claims. Thus, it is relatively easy for a plaintiff’s attorney to file a massive lawsuit by “recruiting” only a few named plaintiffs.

A critical step in class actions—and an important place to raise objections—is class certification. In every class action, a judge must certify that a putative class meets certain criteria, including a sufficiently large size (“numerosity”), common questions of law and fact that predominate across class members, and a class representative who is typical of the class and will adequately represent the interest of absent class members.³⁹ A class action must also be the best way to adjudicate the claims fairly and efficiently. Many high-profile, alleged classes, such as those involving tobacco or asbestos, have not been certified, because the injuries to each plaintiff, the conditions under which the injury occurred, or the state laws applicable to the injuries were so varied as to prevent unified adjudication of the issues.⁴⁰

³⁶ See 15 U.S.C. §§ 2051–2084.

³⁷ 15 U.S.C. § 2064(a)(2). Manufacturers are required to report to the CPSC any information supporting the conclusion either that a product has a defect which could create a substantial product hazard or, even absent such a defect, that the product “creates an unreasonable risk of serious injury or death.” § 2064(b). The existence of an “unreasonable risk” is determined by evaluating “the utility of the product . . . , the level of exposure of consumers to the risk, the nature and severity of the hazard presented, and the likelihood of resulting serious injury or death,” as well as “the state of the manufacturing or scientific art, the availability of alternative designs or products, and the feasibility of eliminating the risk.” 16 C.F.R. § 1115.6(b).

³⁸ 15 U.S.C. § 2064(f). The Administrative Procedure Act is codified at 5 U.S.C. § 500 et seq.

³⁹ Fed. R. Civ. P. 23.

⁴⁰ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (holding that asbestos-exposed individuals do not meet the Fed. R. Civ. P. 23 requirements for class certification); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying class of all nicotine-dependent cigarette smokers); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008).

PLAINTIFF PRACTICE IN THE UNITED STATES

The United States has an influential and well-organized bar of plaintiffs' attorneys. Several features of plaintiff practice in the U.S. aid in facilitating lawsuits.

Contingency Fees and Lawsuit Loans

In the United States, attorneys are ethically and legally permitted to represent clients on a contingency fee basis. The attorney will pay the costs of the litigation and work without payment. The attorney will be paid a fee and reimbursed for the litigation expenses only if the client receives a settlement or judgment in his or her favor, in which case the attorney is entitled to a precontracted percentage of the recovery—frequently one-third or more of the settlement or award.

An increasingly common—and very controversial—practice is lawsuit lending.⁴¹ Plaintiffs may find lenders who will finance their lawsuits through “loans” with extremely high interest rates, repayable only if the plaintiff wins or receives a sufficient settlement. The practice raises a number of ethical and legal issues, and many states are currently engaged in policy debates about the practice.⁴²

The “American Rule” of Attorneys’ Fees

The United States uses the “American Rule” for attorneys’ fees. In general, attorneys’ fees are *not* taxable to the losing party as costs. While this is a boon for defendants who are found liable, it also means that plaintiffs’ attorneys can bring claims with little merit and chance of success, hope to achieve a quick settlement, and not worry about being taxed the defendant’s attorneys’ fees if unsuccessful.

Certain types of actions do allow a successful plaintiff to recover fees from the defendant. State consumer protection laws, for example, often allow for fee shifting. It is much rarer for a plaintiff to be forced to pay a defendant’s fees; those cases usually require some form of malfeasance on the part of the plaintiff or his attorney or rejection of an offer of judgment. Fed. R. Civ. P. 68.

Attorney Advertising

The free-speech rights of the First Amendment of the U.S. Constitution allow attorneys to advertise their services. In general, attorneys may advertise in publications or broadcasts, subject only to certain rules regarding the content of advertisements. Furthermore, attorneys may

solicit clients by written communication (though not by real-time or in-person solicitation), as long as the solicitation is not harassing or coercive. Thus, in cases in which it is possible to identify potential plaintiffs, attorneys have the ability to contact and recruit new clients quickly and easily.

PRACTICAL ADVICE FOR PRODUCT MANUFACTURERS AND SELLERS

PERSONAL JURISDICTION AND VENUE

Every state in the United States is a separate jurisdiction with its own court system, and a plaintiff can bring a lawsuit only in a state that has “personal jurisdiction” over the defendant. The rules regarding personal jurisdiction are thus important to understand for any business setting up operations or distribution chains in the United States.

In general, personal jurisdiction exists only if a party has “minimum contacts” with a state so that requiring it to defend a lawsuit there would “not offend traditional notions of fair play and substantial justice.”⁴³ The U.S. Supreme Court has never defined this nebulous standard with precision, but there are a few general guiding rules. First, a company has the requisite contacts in any jurisdiction in which it has a “continuous and systematic” presence.⁴⁴ This need not be a major presence; a single office with a single employee may suffice.

Second, minimum contacts may exist in any state in which the plaintiff is injured, but only if the defendant “purposefully avails itself”⁴⁵ of the benefit of doing business in that state, so that it “should reasonably anticipate being haled into court there.”⁴⁶ For example, if a manufacturer sells products only in California, a consumer who purchases the product in California and carries it to New York may not sue the manufacturer in New York, even if the injury occurs there. However, if the manufacturer advertised in New York, encouraging consumers to travel to California to buy the product, jurisdiction would probably exist in New York under the “purposeful availment” test. Similarly, a company may be subject to jurisdiction in any state into which its products flow in the “stream of commerce.”⁴⁷ If a company sells a product to a distributor in one state, knowing that

41 See Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. Times, Jan. 16, 2011.

42 See Binyamin Appelbaum, *Lobby Battle Over Loans for Lawsuits*, N.Y. Times, Mar. 9, 2011.

43 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

44 *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

45 *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

46 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

47 *World-Wide Volkswagen*, 444 U.S. at 297–98.

the product will be distributed across the country, then the company may be sued in any state into which the product is distributed and in which it causes an injury.⁴⁸

The federal and state governments also have rules for allocating cases within their judicial systems. Whereas personal jurisdiction is based on constitutional principles of due process, *venue* rules are statutory mechanisms designed to promote the efficiency of the legal system by ensuring that cases are heard in a convenient forum. Generally, venue rules include such factors as where the subject matter of the action is located, where the cause of action arose, or where the defendant does business. In federal courts, venue is governed by 28 U.S.C. § 1391, which prioritizes either a federal judicial district in which any defendant resides (if all the defendants reside in the same state) or a federal judicial district “in which a substantial part of the events or omissions giving rise to the claim occurred.”⁴⁹ In most cases, if the venue is improper, a defendant may petition the court to transfer the case to the correct venue.⁵⁰

In rare cases, a court that properly has jurisdiction over a case and is a proper venue may nonetheless refuse to exercise jurisdiction over the case under the doctrine of *forum non conveniens*, provided that a more appropriate forum is available to the plaintiff and that the court does not have the power to transfer the case to that forum. In a *forum non conveniens* analysis, a court will consider the availability of evidence or witnesses in the alternative forum, the burden on the defendant of defending the case in the plaintiff’s chosen forum, and other questions of public policy and judicial resources.⁵¹

STATE VERSUS FEDERAL COURT

The general stereotype is that plaintiffs prefer actions to be heard in state court and defendants prefer actions to be heard in federal court. This stereotype exists because of perceived biases in the systems: state court judges and juries are seen as being more friendly to local, hometown plaintiffs, whereas federal court judges are seen as being less swayed by local interests and more willing to consider the national or international implications of their rulings. State judges are often elected, whereas federal judges have lifetime appointments.

Generally, the plaintiff gets to choose the litigation forum. However, a defendant sued in a state court outside the state in which it is incorporated or has its principal place of business has the opportunity to “remove” the lawsuit to federal court if at least one of two conditions is satisfied: (i) the claim is based on federal law; or (ii) the amount in controversy in the suit is greater than \$75,000 and no defendant is a citizen of the same state as any plaintiff.⁵²

In standard practice, multiple plaintiffs may not aggregate their claims to reach the \$75,000 threshold. However, in 2005, concerned that plaintiffs’ attorneys were abusing the class action process by bringing large class actions in overly plaintiff-friendly state jurisdictions, Congress passed the Class Action Fairness Act, which relaxed the jurisdictional rules allowing class actions to be heard in federal court. Except in cases in which the parties or issues are particularly local, almost any class action with a total amount in controversy of more than \$5 million may be brought in or removed to federal court.⁵³

The choice of forum will *not* change the substantive law applied, however. A federal court hearing a state-law claim must apply the substantive law that the state court would apply.⁵⁴ The federal court will apply federal rules of procedure and evidence.

MULTIDISTRICT LITIGATION

Another federal procedure available in product liability cases is multidistrict litigation. Recognizing that discovery and other pretrial procedures can involve numerous expenses, Congress has provided a method by which similar cases pending in federal courts across the country can be consolidated in order to make pretrial procedures more just and efficient.⁵⁵ The Judicial Panel on Multidistrict Litigation determines whether the cases involve common questions of fact and whether consolidation will promote justice and efficiency. If so, it may consolidate all the cases before a single federal judge for purposes of discovery and pretrial proceedings. This procedure has advantages and disadvantages. Some states have similar procedures for coordinating all similar cases within their individual states before a single trial judge.

48 Although the Supreme Court has never fully clarified the scope of “stream of commerce” jurisdiction, there are limits to the theory. If the contacts with a state are too attenuated and if the state has no strong interest in having its courts resolve the dispute, a court might find that the contacts are too minimal to support jurisdiction. See *J. McIntyre Machinery, Ltd. v. Nicasastro*, 131 S. Ct. 2780 (2011).

49 28 U.S.C. § 1391(a).

50 See 28 U.S.C. § 1404.

51 See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

52 A corporation is considered to be a citizen of both the jurisdiction of its incorporation and the jurisdiction of its “nerve center” or corporate headquarters.

53 28 U.S.C. § 1332(d).

54 *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

55 28 U.S.C. § 1407.

PRETRIAL DISCOVERY

Another distinct feature of U.S. civil practice is the extensive pretrial discovery, which is frequently the longest and most expensive part of any litigation.

Broad Scope of Discovery

After the initial pleading stage of litigation, any party may request of another party—and has a right to have produced—all documents, information, or witnesses that are relevant to the case. In large cases, the judge overseeing the case will be involved in setting a timeline that establishes the type of materials that must be requested and the dates by which they must be disclosed.

The scope of “relevance” in discovery requests is very broad. In federal practice, it encompasses any information that is “reasonably calculated to lead to the discovery of admissible evidence.”⁵⁶ Discovery requests come in several forms: written interrogatories (questions) to which an opponent must respond; requests for admission of facts; oral depositions of parties and witnesses; and—most critically—requests for documents, including electronic files and data. Any party subject to the court’s jurisdiction may be required to produce documents, even if the files are stored outside the United States.

Electronic discovery is the new frontier in discovery. All “reasonably accessible” data—depending on the quantity of the data, the potential importance of the issue, and the resources of the parties—are discoverable in litigation.⁵⁷ Thus, the ever-increasing volume of email, electronic files and databases, and redundant backups of documents can drastically increase the time and expense of discovery. New methods and technology are constantly necessary to keep up with the increasingly complex process of producing electronically stored data.

Litigation Holds and Spoliation of Evidence

Another important topic in discovery is the “litigation hold.” Parties must refrain from destroying all documents or evidence relevant to a potential or actual lawsuit from the moment they “reasonably anticipate” litigation.⁵⁸ When a party should reasonably anticipate litigation can be based on internal discussions, correspondence, knowledge of particular incidents or accidents, or the filing of similar litigation against another industry member. Intentional destruction of relevant evidence after this time is called “spoliation,” and it can result in a variety of sanctions, including monetary fines, payment of the other side’s

attorneys’ fees, striking of particular defenses, entry of judgment against a party, or civil or criminal contempt charges. Plaintiffs have a similar obligation.

EXPERT WITNESSES

Expert witnesses play a critical role in almost all product liability actions. In U.S. practice, individual litigants retain and pay for experts. Although court-appointed experts are permitted, they are rarely used. On many important issues, juries will hear a “battle of the experts,” and their verdicts may depend on which experts they find more credible.

An expert must be qualified by education, training, or experience to testify on a particular subject. In many U.S. jurisdictions and the federal courts, experts may testify if their testimony passes the “*Daubert* test,” which focuses on the reliability of the expert’s scientific methodology. The test for admissibility is whether the expert used “reliable principles and methods ... applied ... reliably to the facts of the case” in developing the expert opinion.⁵⁹ Some state jurisdictions use the “*Frye* test,” which focuses on whether the expert has used methods and principles “generally accepted” by the scientific community.⁶⁰

THE ATTORNEY-CLIENT PRIVILEGE

In all U.S. jurisdictions, communications between an attorney and a client in a confidential setting, for the purpose of obtaining legal advice, are privileged. The existence of the attorney-client privilege means that the communication is confidential and need not be revealed or produced in response to a discovery request or subpoena unless the client waives the right to keep the information privileged.⁶¹

In the corporate setting, the operation of the attorney-client privilege is somewhat complex. An attorney representing a corporation represents the corporation as an *entity*, but *not* the individual officers, directors, or employees of the company, unless separately retained. Nevertheless, the attorney-client privilege can still exist between the company’s attorney and individuals in the company. In general, when an attorney communicates with an employee for the purpose of gathering information necessary to provide legal advice for the company, the communication is privileged. The interpretation of the privilege can vary between federal and state courts. The privilege can also be waived through disclosure of privileged communications. It is essential to learn and follow the applicable rules of privilege.

56 Fed. R. Civ. P. 26(b)(1).

57 Fed. R. Civ. P. 26(b)(2)(B).

58 See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

59 Fed. R. Evid. 702; see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

60 *Frye v. United States*, 293 F. 1013 (1923). See, e.g., *Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012).

61 Certain exceptions to this rule exist, such as when the client confides to the attorney information that could lead to reasonably certain death or substantial bodily harm if not disclosed to the proper authority or when the communication reveals an intent to commit a crime or fraud.

INSURANCE

Given the potential liability risk of any product manufacturer or seller, it is important to have liability policies that cover the potential liability which can arise under U.S. law. This risk includes not only the range of potential causes of action that can arise under U.S. product liability law, such as strict liability, negligence, breach of warranty, or misrepresentation, but also the range of potential remedies that plaintiffs can pursue.

“Compensatory damages” include not only bodily injury and damage to property, but also the associated economic loss, lost wages, and pain and suffering. Furthermore, companies may also face claims for restitution or amounts that “unjustly enrich” the defendant. A company faces lost business if a court enjoins further production of a product, and it may lose money if a voluntary or mandatory product recall is initiated. Most commercial general liability policies in the U.S., for example, do not indemnify for the cost of product recall. Therefore, a company must purchase separate product recall insurance if it desires that coverage. Many state laws prohibit insurance coverage for punitive damages.

PRODUCT LIABILITY INSURANCE ISSUES

Product manufacturers, sellers, and distributors understand and know that tort litigation in the United States continues to rise and produce staggering verdicts.¹ But domestic manufacturers, sellers, and distributors whose products find their way to countries outside the United States face liability exposures overseas, too.² Because injured consumers are likely to file lawsuits in countries where they live, not the country where a product manufacturer, seller, or distributor is based, U.S. companies may find themselves dealing with foreign courts, judicial systems, and judgments and looking to their liability insurers for international defense and indemnity coverage.³

Although damages awards in product liability lawsuits in foreign countries are generally smaller than those in the United States, judgments in the range of several hundred thousand or even millions of dollars are becoming increasingly common, and other countries are becoming more receptive to the idea of punitive damages and mass claims.⁴ Meanwhile, the “loser pays” system of allocating attorneys’ fees and litigation expenses, used by some foreign jurisdictions, adds to plaintiffs’ verdicts.⁵

U.S. companies faced with foreign product claims may be surprised, however, at unforeseen and unintended limitations on coverage contained in their liability policies. This overview of product liability insurance coverage highlights and discusses key policy provisions and coverage issues in the international product liability context.

OVERVIEW OF PRODUCT LIABILITY COVERAGE IN COMMERCIAL GENERAL LIABILITY POLICIES

The most common source of coverage for product liability claims is an entity’s commercial general liability (“CGL”) policy. Standard CGL policies provide defense and indemnity coverage for damages arising from “ ‘bodily injury’ and ‘property damage’ ” if “[t]he ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence.’ ”⁶ CGL policies, by

and large, define an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”⁷ Facts supporting claims of negligence or strict liability with injury caused by products during the policy period typically are “accidents” or “occurrences,” triggering coverage under standard CGL policies.⁸ Once triggered, a CGL insurer has an affirmative duty to defend and indemnify its policyholder for covered product liability claims.⁹

-
- 1 The five largest U.S. product liability verdicts of 2010 totaled \$1.1 billion—almost twice the figure for 2009 (\$620 million) and three times the figure for 2008 (\$408 million). See Margaret Cronin Fisk, *Defective-Product Verdicts Against Companies Increase*, Bloomberg News (Jan. 18, 2011), available at <http://www.bloomberg.com/news/2011-01-18/defective-product-awards-rise-as-u-s-jurors-slap-companies-with-verdicts.html> (all web sites herein last visited September 11, 2012).
 - 2 See Towers Perrin/Tillinghast, *U.S. Torts and Cross-Border Perspectives: 2005 Update* at 4, 12 (2006), available at http://www.towersperrin.com/tillinghast/publications/reports/2005__Tort__Cost/2005__Tort.pdf.
 - 3 See Ellis, *Int’l Product Exposures Can Hit Business Here, There And Everywhere*, *Ins. Journal Nat’l* (May 8, 2006), available at <http://insurancejournal.com/magazines/features/2006/05/08/69948.htm>.
 - 4 Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 *Am. J. Comp. L.* 751, 808–09 (2003); see generally John Y. Gotanda, *Charting Development Concerning Punitive Damages: Is the Tide Changing?*, 45 *Colum. J. Transnat’l L.* 507 (2007).
 - 5 See Ellis, *Int’l Product Exposures Can Hit Business Here, There And Everywhere*, *Ins. Journal Nat’l* (May 8, 2006), available at <http://insurancejournal.com/magazines/features/2006/05/08/69948.htm>.
 - 6 See ISO Form CG 00 01 12 07, Section I, Coverage A(1)(b).
 - 7 ISO Form CG 00 01 12 07, Definition 13. Older CGL forms define “occurrence” as “an accident, including injurious exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” See, e.g., *Emhart Indus. v. Century Indem. Co.*, 559 F.3d 57, 62 (1st Cir. 2009); *Nat’l Union Fire Ins. Co. v. Puget Plastics Corp.*, 532 F.3d 398, 400–01 (5th Cir. 2008).
 - 8 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 8.03 (15th ed. 2011) (hereafter, “Ostrager & Newman”). Claims alleging intentional acts, including claims for punitive damages, may be excluded from coverage. See ISO Form CG 00 01 12 07, Coverage A, Exclusion 2(a) (excluding “bodily injury or property damage expected or intended from the standpoint of the insured”).
 - 9 ISO Form CG 00 01 12 07, Coverage A.1.a (“We will have the right and duty to defend the insured against any ‘suit’ seeking those damages.”).

THE PRODUCTS-COMPLETED OPERATIONS HAZARD

Beyond the definition of an “occurrence,” standard CGL policies contain coverage provisions and exclusions directly applicable to product liability claims. Before 1986, most standard CGL policies contained separate provisions, liability limits, and deductibles for “products hazards” and “completed operations hazards,” drawing a line between coverage for damages caused by an insured’s products and an insured’s work.¹⁰ Since 1986, however, the two forms of coverage have been combined.¹¹ Current CGL policies, therefore, most commonly apply to traditional product liability claims through what is known as the “products-completed operations hazard.”¹²

Many standard CGL policies today incorporate separate limits of liability and deductibles for claims falling within the products-completed operations hazard.¹³ There may be less coverage or higher deductibles for products-completed operations claims than for other types of claims. In addition, some CGL policies, by endorsement or otherwise, exclude coverage for claims falling within the products-completed operations hazard.¹⁴ For these reasons, it may be advantageous to an insured if a claim falls outside the products-completed operations hazard, even if it happens to involve a product.

The 2007 Insurance Services Office (“ISO”) CGL form defines “products-completed operations hazard” as “all ‘bodily injury’ and ‘property damage’ occurring away from premises you own or rent and arising out of ‘your product’ or ‘your work.’”¹⁵ A threshold question that can arise is whether a policyholder’s “product” or “work” is at issue.

The 2007 ISO CGL form defines “your product” as:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by: (a) You; (b) Others trading under your name; or (c) A person or organization whose business or assets you have acquired; and
- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.¹⁶

The 2007 ISO CGL form also includes product warranties and warnings in the definition of “your product.”¹⁷ Applying this and similar definitions, courts have attempted to draw lines between items typically understood to be products and those that are services. For example, hogs have been held to be products, while HIV-contaminated blood was found to be a “service” and not a “product.”¹⁸

“Your work” is now defined in standard CGL policies as “(1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations.”¹⁹ The definition explicitly includes work performed for an insured by others, such as a subcontractor or third-party manufacturing company. As with product-specific claims, the 2007 ISO CGL form goes on to include in the definition of “your work” both warranties and warnings associated with “your work.”²⁰ Therefore, under current CGL form policies, claims arising out of design or manufacturing product defects, as well as claims arising out of breach of product warranties and failure to warn, typically are covered under the products-completed operations hazard, subject to all other policy terms and conditions.²¹

10 Susan F. Charlton & Laura A. Foggan, *Current Developments in Insurance Law* 166 (PLI 2010).

11 *Id.*

12 See ISO Form CG 00 01 12 07, Definition 16.

13 See, e.g., *Security Ins. Co. v. Lubrizol Corp.*, No. 1:06-CV-215, slip op. at 18 (E.D. Tex. June 4, 2007) (finding policy language regarding aggregate and per-occurrence limits ambiguous).

14 See Craig F. Stanovich, *The Hazards of Products and Completed Operations: Understanding the Fundamentals* (Oct. 2006), available at <http://www.irmi.com/expert/articles/2006/stanovich10.aspx>.

15 See ISO Form CG 00 01 12 07, Definition 16.

16 ISO Form CG 00 01 12 07, Definition 21.

17 ISO Form CG 00 01 12 07, Definition 21(b) (including “[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your product’” and “[t]he providing of or failure to provide warnings or instructions”).

18 See *Ott v. Crews*, 830 F.2d 773, 776 (7th Cir. 1987); *American Red Cross v. Travelers Indem. Co.*, 816 F. Supp. 755, 759–60 (D.D.C. 1993); see also *Am. Institute of Intradermal Cosmetics, Inc. v. Md. Cas. Co.*, 207 F. App’x 417, 418 (5th Cir. 2006). What constitutes a product or service is often hotly contested in asbestos litigation. See, e.g., *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 690 N.E.2d 866, 870 (N.Y. 1997); *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1208–09 (Md. App. Ct. 1997); *Continental Cas. Co. v. Employers Ins. of Wausau*, 871 N.Y.S.2d 48 (App. Div. 2008). CGL policies also often contain professional services exclusions specific to services requiring specialized training, skill, or knowledge that preclude coverage for liability arising out of “rendering or failure to render professional services.” See Tarron Gartner & Steven Shattuck, *The CGL Professional Services Exclusion versus the Professional Liability Policy*, Int’l Risk Mgmt. Institute (May 4, 2004), available at <https://plusweb.org/files/Events/Professional%20Liab%20BO%20%20PD%20Gaps.pdf>.

19 ISO Form CG 00 01 12 07, Definition 22(a).

20 ISO Form CG 00 01 12 07, Definition 22(b)(1), (2).

21 Two limitations are contained within the current definition of “products-completed operations hazard.” First, the damage must occur away from the insured entity’s premises. ISO Form CG 00 01 12 07, Definition 16(a)(1). Second, an insured’s work must be completed or abandoned. *Id.* at Definition 16(a)(2). In addition, manufacturers in particular industries, such as aviation, must consider whether market-specific exclusions could apply to claims of injury from their products. See, e.g., *id.* at Exclusion g (“Aircraft, Auto or Watercraft”).

ECONOMIC LOSS EXCLUSIONS

If the products-completed operations hazard applies to a product liability lawsuit, another question raised may be whether the lawsuit seeks covered damages. Relevant to that question are three standard CGL policy exclusions that purport to preclude coverage for certain economic losses resulting from an insured's products and work.²² The first excludes coverage for “ ‘property damage’ to ‘your product’ arising out of it or any part of it.”²³ The second excludes coverage for “ ‘property damage’ to ‘your work’ arising out of it or any part of it.”²⁴ And the third excludes coverage for “ ‘property damage’ to ‘impaired property’ or property that has not been physically injured, arising out of” a “defect, deficiency, inadequacy or dangerous condition in ‘your product’ or ‘your work’ ” or a “failure . . . to perform a contract or agreement in accordance with its terms.”²⁵

Together, the first two of these exclusions mean that, although third-party liability for damage caused by a policyholder's product or work is covered, there is no coverage for damage to the insured's own product or work, which can include costs of repairing a failed product or any reduction in a failed product's value. The purpose of these exclusions is to limit CGL coverage to third-party liability and prevent an insured from using CGL insurance as first-party property coverage for its own products or as a performance bond for its own work.²⁶

Similarly, the third exclusion—for “ ‘property damage’ to ‘impaired property’ or property that has not been physically injured, arising out of” a “defect, deficiency, inadequacy or dangerous condition in ‘your product’ or ‘your work’ ” or a “failure . . . to perform a contract or agreement in accordance with its terms”²⁷—seeks to exclude coverage for the cost of repairing or replacing

a failed component of a final product. However, if a failed component part causes physical injury to another party's property, coverage exists.²⁸

In assessing the applicability of these exclusions, insurers and policyholders often have differing views of what constitutes damage to the insured's product and what constitutes damage to another product or the product of a distinct entity. Litigation involving these exclusions frequently arises in the context of integrated products.²⁹ If a policyholder's product is integrated into a larger product (e.g., couplings incorporated into an engine), and a policyholder can show damage to portions of the larger or full product (i.e., the engine), then the “your work” and “your product” exclusions should not apply to the damage to the larger or full product.³⁰

COVERAGE TERRITORY

Standard-form CGL policies provide coverage for occurrences that take place in a defined “coverage territory.”³¹ “Coverage territory” definitions vary from policy to policy, and many policies extend to occurrences anywhere in the world, without geographic limitation.³²

Other “coverage territory” definitions, however, are limited to domestic occurrences and lawsuits. Others may extend to injuries occurring outside the United States, but only if the claims are pursued in lawsuits filed in the United States.³³ The 2007 ISO CGL form, for example, on first glance appears to extend to injuries occurring anywhere in the world. But there are two important caveats.³⁴ Coverage extends to injuries occurring outside the United States only if: (i) the injuries are caused by goods made in “[t]he United States of America (including its territories and possessions), Puerto Rico and Canada”; and (ii) the

22 ISO Form CG 00 01 12 07, Exclusions k, l.

23 ISO Form CG 00 01 12 07, Exclusion k.

24 ISO Form CG 00 01 12 07, Exclusion l.

25 ISO Form CG 00 01 12 07, Exclusion m.

26 See 4 Leitner et al., *Law & Prac. of Ins. Coverage Litig.* § 46:13 (2005) (hereafter, “Leitner et al.”).

27 ISO Form CG 00 01 12 07, Exclusion m.

28 See Craig F. Stanovich, *The Impaired Property Exclusion* (April 2010), available at <http://www.irmi.com/expert/articles/2010/stanovich04-cgl-general-liability-insurance.aspx>. There is an exception to this exclusion that provides coverage when your product or your work abruptly damages itself. *Id.*

29 See, e.g., *Gulf Fleet Marine Operations, Inc. v. Wartsila Power, Inc.*, 797 F.2d 257, 260–61 (5th Cir. 1986); *Missouri Terrazzo Co. v. Iowa Nat'l Mut. Ins. Co.*, 740 F.2d 647, 651 (8th Cir. 1984); *Stewart Interior Contractors, LLC v. Metalpro Indus., LLC*, 969 So.2d 653 (La. Ct. App. 2007).

30 Cf. *Hamlin, Inc. v. Hartford Acc. & Indem. Co.*, 86 F.3d 93, 95 (7th Cir. 1996) (LCDs manufactured by insured caused third party's instrument panels to malfunction; insured settled with third party, and “your product” exclusion applied to settlement because third party's complaint had alleged only that the panels “would not work” and not that they were “physically injured”), with *Centillum Commc'ns, Inc. v. Atlantic Mut. Ins. Co.*, 528 F. Supp. 2d 940, 950 (N.D. Cal. 2007) (insurer had duty to defend because plaintiff in underlying product liability action alleged not only that insured's microchips had been defective, but that they had caused damage to other components of underlying plaintiff's hardware).

31 ISO Form CG 00 01 12 07, Section I, Coverage A, Insuring Agreement ¶ 1.b(1) (“This insurance applies to ‘bodily injury’ and ‘property damage’ only if . . . [t]he ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’ . . .”).

32 See, e.g., *TH Agric. & Nutrition, L.L.C. v. ACE European Group, Ltd.*, 416 F. Supp. 2d 1054, 1062 (D. Kan. 2006) (describing worldwide coverage).

33 ISO Form CG 00 01 12 07, Definition 4.

34 *Id.*

“insured’s responsibility to pay damages is determined in a ‘suit’ on the merits, in the territory described . . . above.”³⁵

Policyholders with global exposures can negotiate for a broader coverage territory or use specialty “wrap-up” or “supplier” policies to address exposure beyond the coverage territory of their standard CGL policies.³⁶ But, in procuring those policies, attention must be paid to differing exclusions that may, in effect, limit geographic coverage for particular types of claims.

A recent example is *ACE American Insurance Co. v. RC2 Corp.*, 600 F.3d 763 (7th Cir. 2010). There, the insured had two CGL policies—one covering occurrences taking place in the United States and the other covering only international occurrences.³⁷ The domestic CGL policy contained an exclusion for injuries arising from lead. The international policy did not.³⁸ When the insured was sued for alleged injuries occurring in the United States because of lead paint on the insured’s “Thomas & Friends” toys, manufactured in China, the insured could not recover under its domestic CGL policies due to the lead exclusion.³⁹ The insured turned to its international policies for coverage, arguing that the relevant “occurrence” was the negligent manufacturing in China, within the international policy’s coverage territory.⁴⁰ The Seventh Circuit rejected the argument and held that the location of the occurrence is the location of the injury—not the precipitating cause of the injury.⁴¹

Therefore, U.S. companies with global product distribution or manufacturing operations outside the United States should carefully review the defined coverage territory of their CGL policies to ensure appropriate coverage for all locations in which the policyholder has exposure. If sepa-

rate policies are obtained to provide coverage for domestic and international operations, attention should be paid to exclusions in both policies so that there are not inadvertent gaps in coverage effectively limiting the territory covered for particular liabilities.

PRODUCT RECALL COVERAGE

In most cases, a standard CGL policy does not cover the insured’s own product recalls. Even if there is an “occurrence” triggering the CGL policy (and a recall is not always an occurrence),⁴² the standard CGL policy contains what is commonly referred to as the recall or “sistership” exclusion. That exclusion precludes coverage “for the loss of use, withdrawal, recall . . . of ‘your product’ or ‘your work’ . . . if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.”⁴³ The sistership exclusion may bar coverage even if someone other than the insured ordered a recall of the insured’s product.⁴⁴

In addition to the recall exclusion, the impaired property exclusion, which excludes coverage for products that incorporate the insured’s work or product “if such property can be restored to use by the repair, replacement, adjustment or removal of ‘your product’ or ‘your work’ or your fulfilling the terms of the contract or agreement,” as well as other standard so-called “business risk exclusions,” can block coverage for recalls.⁴⁵ Of course, to the extent that a recalled product causes third-party bodily injury or property damage, a CGL policy may provide coverage for that third-party damage.⁴⁶

35 *Id.*

36 Some such insurance products include ACE Foreign Supplier Liability Insurance (described at <http://www.acegroup.com/us-en/businesses/foreign-supplier-liability-insurance.aspx>) and Chartis Product Liability Wrap-Up for Foreign-Based Multinationals (described at http://www.chartisinsurance.com/us-product-liability-wrap-up-for-foreign-based-multinationals__295_181638.html).

37 *ACE Am. Ins. Co. v. RC2 Corp.*, 600 F.3d 763, 765 (7th Cir. 2010).

38 *Id.*

39 *Id.*

40 *Id.* at 765–66.

41 *Id.* at 768–70 (citing *CACI Int’l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150 (4th Cir. 2009); *Farmers Alliance Mut. Ins. Co. v. Salazar*, 77 F.3d 1291, 1296 (10th Cir. 1996)).

42 See *Sokol & Co. v. Atlantic Mut. Ins. Co.*, 430 F.3d 417, 422 (7th Cir. 2005) (holding that spoiled peanut-butter packets incorporated into a product did not trigger a CGL policy).

43 See, e.g., ISO Form CG 00 01 12 07, § I(A)(2)(n).

44 This is a change from the prior version of the recall exclusion, which generally applied only where the insured (but not a third party) instituted the recall. See, e.g., *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 314 N.E.2d 37, 38 (N.Y. 1974); *Olympic Steamship Co. v. Centennial Ins. Co.*, 811 P.2d 673, 676–77 (Wash. 1991).

45 See, e.g., *Cytosol Labs., Inc. v. Fed. Ins. Co.*, 536 F. Supp. 2d 80, 90–94 (D. Mass. 2008) (applying the “your product,” “impaired property,” and “product recall” exclusions to preclude coverage); *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 78 Cal. App. 4th 847 (2000) (stating that “[t]he [impaired property] exclusion reflects the principle that, [a]s a general matter, the risk of replacing or repairing a defective product is considered a commercial risk which is not passed on to a liability insurer,” but holding that the impaired property exclusion did not apply where it was “fanciful to suppose” that the defective component could be removed without destroying the entire product (citation omitted)).

46 See, e.g., *U.S. Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 934 (Ill. 1991) (“The underlying complaints seek damages for the inspection of the buildings and the removal and replacement of this product, not as the cost of a preventative action withdrawing the sister products from the market, but as a measure of the property damage which has already been incurred by the reason of this product.”).

Specialized product recall coverage is available in the marketplace, both in the form of an endorsement to a CGL policy and as a stand-alone policy. Some insurers, for example, will agree to endorse the standard CGL policy with recall coverage. An ISO form recall endorsement provides coverage for “product withdrawals”:

“Product withdrawal” means the recall or withdrawal:

- a. From the market; or
- b. From use by any other person or organization;

of “your products,” or products which contain “your products,” because of known or suspected “defects” in “your product,” or known or suspected “product tampering,” which has caused or is reasonably expected to cause “bodily injury” or physical injury to tangible property other than “your product.”⁴⁷

The ISO endorsement has “Coverage A” and “Coverage B.”⁴⁸ Coverage A, or first-party recall coverage, covers an insured’s costs as part of a recall, including costs to replace or repair the defective product, notification costs, warehouse costs, employee overtime, disposal costs, and other costs. Coverage B, or third-party recall coverage, defends and indemnifies the insured from third-party claims (e.g., by customers) related to a recall.

However, purchasing product recall insurance as an endorsement to a CGL policy may pose significant disadvantages. First, unlike some stand-alone policies, the ISO recall endorsements may not be triggered by government-mandated recalls, which may or may not involve a “reasonable expectation” of bodily injury or property damage. Second, product recall coverage as part of a CGL program is often subject to a low sublimit, providing very limited protection.⁴⁹ Third, even if an insured is able to get a higher sublimit, a significant product recall claim may erode the limits of the CGL policy (and/or any excess policies that follow form), which would reduce the

insured’s coverage for liability claims arising from the same recalled product. The better alternative for many insureds, therefore, is a stand-alone product recall policy, available in the market from a variety of insurers.⁵⁰

But any insured purchasing a product recall policy should pay particular attention to the disposal and salvage rights under that policy. Invoking such provisions, an insurer may assert a right to salvage a recalled product, even though the insured may view it as necessary to dispose of the product. For example, the insurer may see value in repackaging and selling a recalled product in another country. This could damage a company’s reputation—the insured would not want an unsafe product sold even if legal—and potentially create a liability issue if the product causes injury. Insureds should consider negotiating the right on the part of the insured to decide whether a recalled product should be disposed of or resold.

THE BERMUDA FORM

Product manufacturers, distributors, and sellers in the United States with high-level, multilayer liability policies may have a “Bermuda Form” policy at or near the top of their programs. After the U.S. market for excess coverage shrank dramatically in the mid-1980s, the Bermuda Form was developed to fill the void.⁵¹ At that time, a series of excess insurers established themselves in Bermuda and developed a liability policy form that seeks to avoid U.S. insurance regulation.⁵² Bermuda Form liability policies typically attach at the highest levels of a liability program (\$50 million or more).⁵³

ALTERNATIVE DISPUTE RESOLUTION AND ARBITRATION CLAUSES

Although many primary CGL policies do not contain alternative dispute resolution or arbitration clauses, Bermuda Form policies may contain foreign arbitration clauses that require arbitration in London or Bermuda and

47 ISO Form CG 00 66 12 04. See also ISO Forms CG 04 36 12 04, CG 04 36 10 01. One issue is whether an insured-initiated recall is covered or whether the recall must be initiated “by any other person or organization.” Insureds should clarify this issue as part of policy negotiations.

48 *Id.* For other forms and options, see ISO Forms CG 04 36 12 04, CG 04 36 10 01.

49 See ISO Form CG 04 36 10 01 (“Limited Product Withdrawal Expense Endorsement”). See also *Cytosol Labs., Inc. v. Fed. Ins. Co.*, 536 F. Supp. 2d 80, 87 (D. Mass. 2008) (noting that the products withdrawal and crisis management insurance that the insured purchased as an add-on to its CGL policy had a sublimit of only \$25,000).

50 XL Insurance (Bermuda) has an available “Product Contamination Insurance Policy” that provides coverage for “Accidental Contamination” (broadly defined to include any “Error in the manufacture, production processing, preparation, assembly, blending, mixing, compounding, packaging or labeling . . . of any Insured Product,” provided it is likely to lead to bodily injury or property damage), “Malicious Contamination,” “Product Extortion,” “Forced and/or Government Recall,” and “Adverse Publicity.” See XLIB-CPI (10/2010). Numerous other insurers, including Catlin, Chartis, and Starr, also offer recall or contamination policies. It is not possible to recommend any particular insurer without a thorough review of the proposed policy terms.

51 See, e.g., Smith & Sylvester, *Coming to Grips with the Bermuda Form*, Strategic Risk 38 (Feb. 2006) (hereafter, “Smith & Sylvester”); Dolin & Posner, *Understanding the Bermuda Excess Liability Form*, 1 Journal of Insurance Coverage 69–70 (Autumn 1998) (hereafter, “Dolin & Posner”); Jacobs et al., *Liability Insurance in International Arbitration: The Bermuda Form* §§ 1.01–1.18 (2004) (hereafter “Jacobs et al.”).

52 Dolin & Posner at 69–70.

53 Smith & Sylvester at 38.

seek to preclude litigation of coverage claims in U.S. courts or arbitral tribunals.⁵⁴ The text of a typical Bermuda Form arbitration clause reads:

Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975, and 1979 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy⁵⁵

The Bermuda Form policy subsequently clarifies that “as respects arbitration procedure . . . , the internal laws of England and Wales shall apply.”⁵⁶

Under these clauses, English law ostensibly governs the pleadings, discovery, evidentiary disputes, issues of privilege, and any award of costs, as well as the confirmation or enforcement of any arbitration award.⁵⁷ But English laws and procedures differ substantially from those in the United States, especially with regard to discovery, privilege, and cost awards. For example, discovery in England is typically limited to document exchanges—discovery depositions are not regularly available.⁵⁸ Likewise, the attorney-client privilege is considered to be “a fundamental human right” in England, and there are limited grounds on which to challenge an attorney’s claim of privilege.⁵⁹ And, under the English system, the losing party pays the costs, including attorneys’ fees, of the prevailing party.⁶⁰

Not only do Bermuda Form excess policies attempt to select the arbitration venue and the law to govern arbitration procedures, but these policies also seek to select the substantive law to govern coverage disputes.⁶¹ In what has become known as a selection of New York law “minus,” Bermuda Form policies seek to incorporate New York substantive law, except as to certain enumerated issues of policy interpretation and substance: “This Policy, and any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws” prohibit indemnity for punitive damages, pertain to state insurance regulations, are inconsistent with a policy provision, and favor the insured in policy interpretation.⁶²

Because private arbitration is ostensibly mandatory under the Bermuda Form, and because English law makes arbitration confidential,⁶³ there are few—if any—published decisions in the United States, England, or elsewhere interpreting or applying the language of Bermuda Form liability policies, even though the Bermuda Form has existed for more than 15 years.⁶⁴ An imbalance of information regarding policy interpretation and application therefore exists between Bermuda Form excess insurers—with repeated participation and experience in the arbitration system under the form policy—and typical policyholders—with substantially less frequent claims experience. To reduce the impact of this imbalance, when faced with liability claims that exceed primary policy limits, policyholders should engage coverage counsel with prior experience arbitrating claims under the Bermuda Form.

54 Jacobs et al. at §§ 1.25–1.26. Newer forms also add Toronto as a possible arbitration venue.

55 XL Insurance (Bermuda) Ltd., Form XS004.1/96, Condition N (hereafter “XL Form XS004”).

56 XL Form XS004, Condition O.

57 See Jacobs et al., *Liability Insurance in International Arbitration: Choice of Law Issues in ‘Bermuda Form’ Arbitrations*, 20 *Arbitration Int’l* 275–76 (2004); see also Dolin & Posner at 79–84.

58 See *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 561 n.19 (1987) (“‘In England, for example, although document discovery is available, depositions do not exist, interrogatories have strictly limited use, and discovery as to third parties is not generally allowed.’”) (quoting S. Seidel, *Extraterritorial Discovery in International Litigation* 24 (1984) (Blackman, J., concurring in part and dissenting in part)).

59 See *R (Morgan Grenfell & Co. Ltd.) v. Special Commissioner of Income Tax* [2003] 1 A.C. 563, ¶ 7 (H.L.); *Winterthur Swiss Ins. Co. v. AG Ltd.* [2006] EWHC 839, ¶ 65 (Q.B.).

60 Jacobs et al., *Liability Insurance in International Arbitration: Choice of Law Issues in ‘Bermuda Form’ Arbitrations*, 20 *Arbitration Int’l* 288 (2004) (“It is, of course, usual in England for the unsuccessful party to pay the successful party’s reasonable costs, and those of the tribunal.”).

61 See *C v. D* [2007] EWCA (Civ.) 1282, ¶ 1 (C.A.) (“The striking feature of the form is that it requires the parties to arbitrate in London but provides for the proper law of the insurance contract to be the internal laws of New York. No doubt this represents a balancing of the conflicting interests of the insured on the one hand and liability insurers on the other.”); see also Jacobs et al., *Liability Insurance in International Arbitration: Choice of Law Issues in ‘Bermuda Form’ Arbitrations*, 20 *Arbitration Int’l* 269–70 (2004).

62 XL Form XS004, Condition O; see also Jacobs et al., *Liability Insurance in International Arbitration: Choice of Law Issues in ‘Bermuda Form’ Arbitrations*, 20 *Arbitration Int’l* 278–88 (2004); Smith & Sylvester at 39; Dolin & Posner at 76–77.

63 Mustill & Boyd, *The Law & Prac. of Commercial Arbitration in England* 303–04 (2d ed. 1989) (stating that it is “implicit in the nature of private arbitrations that the proceedings are confidential, and that strangers shall be excluded from the hearing”); see also *Ali Shipping Corp. v. Shipyard Trogir*, 2 All E.R., 1 Lloyd’s Rep. 643 (Eng. Ct. App. 1998); Sarles, *Solving the Arbitral Confidentiality Conundrum in Int’l Arbitration* 5–6, available at <http://www.appellate.net/articles/Confidentiality.pdf>.

64 See *C v. D* [2007] EWCA (Civ.) 1282, ¶ 1 (C.A.) (stating that “[t]his appeal is, as far as I am aware, the first time that this court has had the opportunity to consider the Bermuda Form which has emerged in the last 15 years or so.”); see also Dolin & Posner at 68 (“There is a surprising lack of interpretive and explanatory materials regarding these Bermuda forms. This is largely because the Bermuda-based insurers do not have long claims-paying histories, and their policies have not been subject to judicial interpretation.”).

One other procedural issue created by Bermuda Form policies (or any other policies requiring arbitration) in a multilayer liability insurance program is that mandatory arbitration provisions may attempt to preclude simultaneous resolution of coverage disputes involving more than one layer of coverage, instead seeking to require individual, policy-by-policy resolution of disputes, even for common issues of fact or law. Unless and until a consolidated arbitration procedure is negotiated for a program or otherwise adopted, Bermuda Form arbitration procedures in multiple policies can result in serial arbitration of the same issue and concomitant delay in resolving excess layer claims. To date, judicial challenges to Bermuda Form and similar arbitration clauses have been largely unsuccessful, even in states with statutes voiding arbitration clauses in insurance policies.⁶⁵

INTEGRATED OCCURRENCES

Another Bermuda Form provision relevant to product liability claims is the “Integrated Occurrence” provision.⁶⁶ An “Integrated Occurrence” is:

an Occurrence encompassing actual or alleged Personal Injury, Property Damage and/or Advertising Liability to two or more persons or properties which commences over a period longer than thirty (30) consecutive days which is attributable directly, indirectly or allegedly to the same actual or alleged event, condition, cause, defect, hazard and/or failure to warn of such.⁶⁷

Under this clause, for product liability injuries that are related but occur over time, the policyholder may give notice of an Integrated Occurrence.⁶⁸ Individual product liability claims, which would never alone exceed

per-occurrence limits or retentions imposed by high-level excess liability policies, are aggregated into a single occurrence that may trigger excess coverage.⁶⁹ The insurer is then able to keep all related claims in a single policy limit.⁷⁰

Notification of an occurrence as an Integrated Occurrence is at the insured’s option.⁷¹ If a policyholder gives notice of a traditional occurrence before an insured understands that more claims based on the same or similar events have arisen or may arise in the future, the insured can provide notice of an Integrated Occurrence at a later date.⁷² The decision whether to notify an Integrated Occurrence under a Bermuda Form excess liability policy should be based on a risk analysis of potential future claims arising from the same or a related cause or condition.⁷³

OTHER ISSUES IN PRODUCT LIABILITY COVERAGE

Although a complete catalog of all insurance provisions relevant to product liability claims is beyond the scope of this overview, certain other issues arise with some frequency in seeking coverage for product liability claims. Policyholders and insurers regularly encounter choice-of-law, subrogation, other insurance, notice, and insured identity issues.

CHOICE OF LAW

Primary CGL policies typically do not incorporate choice-of-law clauses. The 2007 ISO CGL form, for example, does not select the law of any particular jurisdiction. Nor do appended state-specific cancellation, notice, or other endorsements act as choice-of-law provisions.⁷⁴ The lack

65 See, e.g., *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's*, 587 F.3d 714 (5th Cir. 2009); *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71 (1st Cir. 2000); *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co.*, 466 F. Supp. 2d 1293 (N.D. Ga. 2006); *Triton Lines, Inc. v. Steamship Mut. Underwriting Ass'n*, 707 F. Supp. 277 (S.D. Tex. 1989).

66 See, e.g., XL Form XS004, Definition R (“Integrated Occurrence”).

67 *Id.*

68 See Smith & Sylvester at 39.

69 *Id.*

70 Dolin & Posner at 71–72.

71 XL Form XS004, Section V (“Notice of Occurrence”) ¶ C (“Permissive Notice of Integrated Occurrence”); Memorandum from Robert J. Cooney to “All X.L. Excess Liability Insureds Under Form XS-004” titled “Notice Guidelines” (Dec. 1, 1995), available at <http://legacy.library.ucsf.edu/tid/rev44a00/pdf> (“Whether or not to give notice of an ‘Integrated Occurrence’ is at the option of the Insured.”).

72 Memorandum from Robert J. Cooney to “All X.L. Excess Liability Insureds Under Form XS-004” titled “Notice Guidelines” (Dec. 1, 1995), available at <http://legacy.library.ucsf.edu/tid/rev44a00/pdf> (“Further, even if the Insured determined to notify the deaths initially as separate occurrences (say, because it was not immediately apparent that both deaths were traceable to the same contaminated truckload), the Insured (so long as it continued coverage) could later give an Integrated Occurrence notice.”).

73 Smith & Sylvester at 39. The most prominent product liability example of an Integrated Occurrence under the Bermuda Form is injuries allegedly arising from silicone gel breast implants. While individual implant cases did not trigger higher-level Bermuda Form excess policies, manufacturers exceeded self-insured retentions and obtained coverage for their liabilities through the Integrated Occurrence feature. *Id.*; Dolin & Posner at 71–72.

74 See, e.g., *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 231 (3d Cir. 2007) (“[W]e do not think these references to New York amount to an implicit agreement between [insurer] and [insured] that New York law should govern.”); *Sonoco Bldgs., Inc. v. Am. Home Assurance Co.*, 877 F.2d 1350, 1352 (7th Cir. 1989) (“[T]he insurance policy provision cited by Sonoco does not indicate that the parties stipulated to Texas as the source of law for interpreting the terms of the policy.”); *PW Stephens Contractors, Inc. v. Mid Am. Indem. Ins. Co.*, 805 F. Supp. 854, 856–57 (D. Haw. 1992) (applying Hawaii law despite “standard language that tells a policy buyer of his or her rights under Texas law”); *Beltway Mgmt. Corp. v. Lexington-Landmark Ins. Co.*, 746 F. Supp. 1145, 1148 (D.D.C. 1990) (New York amendatory endorsements do not “designate which state’s law should apply”).

of such clauses often leads to complicated and costly choice-of-law battles in coverage litigation.

In the absence of an express choice of law by the parties, there are three basic approaches to choice of law for CGL insurance disputes. A small minority of states continue to apply the *lex loci contractus* rule of the Restatement (First) of Conflict of Laws.⁷⁵ In those jurisdictions, with the benefit of some level of certainty, the law of the place of contracting governs.⁷⁶

Most courts, however, employ the more flexible “most significant relationship” analysis articulated in Section 188 of the Restatement (Second) of Conflict of Laws.⁷⁷ This sometimes amorphous analysis considers a series of “contacts,” “factors,” and “principles,” resulting in application of the law of the state that a court determines has the most significant relationship to the policy and the parties.⁷⁸ For CGL policies, relevant factors include the domiciles of the insurer and insured as well as the place of policy application, negotiation, execution, delivery, mailing, acceptance, premium payment, and performance.⁷⁹

The third approach to choice of law, relevant to liability policies that insure risks in particular or multiple locations, is the “location of the insured risk” approach articulated in Section 193 of the Restatement (Second) of Conflict of Laws:

The validity of a contract of casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be *the principal location of the insured risk during the term of the policy*, unless with respect to a particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties.⁸⁰

For “multiple-risk policies” covering a company’s operations or risks in multiple states, the comments to Section 193 explain that courts should “treat such a case, at least with respect to most issues, as if it involved [multiple] policies, each insuring an individual risk.”⁸¹ This results in the application of different states’ laws to the same CGL policy, if liabilities arise from an insured’s operations in more than one state.⁸² The insured’s operations in each state are deemed separate, “individual risk[s],” and the law of the state of the relevant “insured risk” applies.

SUBROGATION RIGHTS

Most liability policies reserve for the insurer a right of subrogation, requiring that the policyholder cooperate however necessary to secure that right.⁸³ A typical subrogation clause reads:

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring “suit” or transfer those rights to us and help us enforce them.⁸⁴

Therefore, when an insurer indemnifies an insured that is entitled to compensation from a third party, the insurer is subrogated to the rights of recovery against that third party and “stands in the shoes” of the insured with respect to all of the insured’s rights.⁸⁵

But subrogation rights properly arise only against third parties, and an insurer may not bring a subrogation claim against its own insured or a co-insured under a single policy.⁸⁶ This “anti-subrogation rule” prevents insurers from

75 See, e.g., Restatement (First) Conflict of Laws §§ 318, 332, 338 (1934); *Hartford Acc. & Indem. Co. v. Am. Red Ball Transit Co.*, 938 P.2d 1281, 1285–86 (Kan. 1997); *State Farm Mut. Auto. Ins. Co. v. Baker*, 797 P.2d 168, 171 (Kan. Ct. App. 1990); see also Mathias et al., *Insurance Coverage Disputes* § 4.01[1] (2010); Leitner et al. §§ 9:3–9:13.

76 See, e.g., Couch on Insurance 3d § 24:10 (West 2005).

77 See Restatement (Second) Conflict of Laws §§ 188, 6 (1971); see also Mathias et al., *Insurance Coverage Disputes* § 4.01[2] (2010).

78 See Restatement (Second) Conflict of Laws §§ 188, 6 (1971); Mathias et al., *Insurance Coverage Disputes* § 4.02 (2010).

79 See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 829 F.2d 227, 247–48 (1st Cir. 1987); *Interface Flooring Sys., Inc. v. Aetna Cas. & Surety Co.*, 804 A.2d 201, 206–07 (Conn. 2002); *Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 940 N.E.2d 810, 815 (Ind. 2010); *Gabe’s Constr. Co. v. United Cap. Ins. Co.*, 539 N.W.2d 144, 146–47 (Iowa 1995); *Zurich Am. Ins. Co. v. Goodwin*, 920 So.2d 427, 435–36 (Miss. 2006).

80 Restatement (Second) Conflict of Laws § 193 (emphasis added); see also *id.* at comment a (“The rule of this Section applies to contracts of fire insurance, surety insurance and the various kinds of casualty insurance, such as theft insurance, liability insurance”); see also *Diamond Int’l Corp. v. Allstate Ins. Co.*, 712 F.2d 1498, 1501–02 (1st Cir. 1983); *Gates Formed Fibre Prods., Inc. v. Plasti-Vac, Inc.*, 687 F. Supp. 688, 689–91 (D. Me. 1988); *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 14 Cal. App. 4th 637, 645–48 (Cal. Ct. App. 1993); *Atlas Intermodal Trucking Serv., Inc. v. United Fire & Cas. Co.*, 973 S.W.2d 174, 177–78 (Mo. Ct. App. 1998).

81 Restatement (Second) Conflict of Laws § 193, comment f.

82 See, e.g., *Pioneer Chlor Alkali Co. v. Nat’l Union Fire Ins. Co.*, 863 F. Supp. 1237, 1240–41 (D. Nev. 1994); *Standard Fusee Corp.*, 940 N.E.2d at 815–16.

83 See, e.g., XL Form XS004, Condition I; see also Leitner et al. at § 42:6 (“Except where prohibited by law, insurance contracts almost invariably provide for subrogation rights when a payment is made.”); *id.* at § 42:42 (“Failure of the insured to cooperate or if the insured affirmatively compromises subrogation rights can cause the insured to owe repayment to the insurer if prejudice can be proved.”).

84 ISO Form CG 00 01 12 07, Condition 8 (“Transfer Of Rights Of Recovery Against Others To Us”).

85 Ostrager & Newman at § 22.06; Couch on Insurance 3d § 223:1 (West 2005). Even without a contractual subrogation provision or right, an insurer may invoke common-law equitable subrogation doctrines. See Leitner et al. at § 42:4.

86 Leitner et al. at § 42:6; Couch on Insurance 3d § 224:1 (West 2005); Ostrager & Newman at § 22.06.

recovering back from the insured or a co-insured the risk of loss or damage that the insured passed along under the policy.⁸⁷ Insurers, however, have attempted to enforce subrogation rights against third-party contractors and even the corporate parent of a subsidiary held liable for product defect and other claims.⁸⁸

“OTHER INSURANCE” CLAUSES

Because the manufacture and sale of a single product today usually involves multiple suppliers, manufacturers, and distributors, all of which may carry liability insurance, several liability policies may cover the losses or damages caused by a product claim.⁸⁹ Anytime more than one policy covers a loss or damage, questions arise regarding which insurer pays first and how, if at all, other insurers must contribute. Most policies contain “Other Insurance” clauses meant to prioritize payments under applicable policies.⁹⁰

Initially, it is worth noting that Other Insurance clauses affect rights to contribution between insurers. The clauses should not affect an insured’s right to recover under a particular policy.⁹¹ Other Insurance clauses do not permit an allocation of payments to the insured—even if payments are properly allocated among the insurers themselves.⁹² In reality and practice, however, insureds may find themselves involved in a struggle between two insurers, each attempting to shift indemnity obligations to the other.⁹³

Generally, three types of Other Insurance clauses are recognized: (i) “excess” clauses, which provide that an

insurer will pay a loss only after other available primary insurance is exhausted; (ii) “escape” clauses, which provide that an insurer will not pay if another policy insures the same risk; and (iii) “pro rata” clauses, which limit the insurer’s exposure to its share of the loss in proportion to the aggregate coverage insuring the risk.⁹⁴

When there is no incompatibility between Other Insurance clauses, they are enforced according to their terms.⁹⁵ But difficulties arise when Other Insurance clauses in two or more applicable policies conflict.⁹⁶ For example, when two policies contain excess clauses, literal application of the two clauses would leave the insured without any primary coverage.⁹⁷ The historical rule in the face of conflicting Other Insurance clauses is that the provisions are treated as mutually repugnant, and the policies must contribute on a prorated or equal-shares basis.⁹⁸ Other cases, however, assess the function and intent of various policies to determine whether they should be ranked in a particular order.⁹⁹ Under this developing “total policy insuring intent” test, a policy designed to cover a particular risk takes precedence over and must pay before a policy that incidentally covers the same risk.¹⁰⁰

NOTICE AND CONSENT TO SETTLE

Nearly all CGL policies require prompt notice of claim to the insurer and an insurer’s consent to settle any underlying claim.¹⁰¹ A typical notice provision requires notice to the insurer “as soon as practicable of an ‘occurrence’ or an offense which may result in a claim,”¹⁰² while a typical

87 Couch on Insurance 3d §§ 224:3, 224:5 (West 2005).

88 See, e.g., *Jinwoong, Inc. v. Jinwoong, Inc.*, 310 F.3d 962 (7th Cir. 2002); *Transport Trailer Serv., Inc. v. Upjohn Co.*, 506 F. Supp. 442 (E.D. Pa. 1981); *Munters Euroform GMBH v. Am. Nat’l Power, Inc.*, No. 03-05-00493-CV, 2009 Tex. App. LEXIS 9860 (Tex. Ct. App. Dec. 31, 2009).

89 See, e.g., *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002); *Twin City Fire Ins. Co. v. Fireman’s Fund Ins. Co.*, 386 F. Supp. 2d 1272 (S.D. Fla. 2005).

90 See ISO Form CG 00 01 12 07, Condition 4; XL Form XS004, Condition H.

91 Couch on Insurance 3d § 219:1 (“‘Other Insurance’ clauses govern the relationship between insurers, they do not affect the right of the insured to recover under each concurrent policy.”).

92 Leitner et al. at § 38:3.

93 See *Marwell Constr., Inc. v. Underwriters at Lloyd’s, London*, 465 P.2d 298 (Alaska 1970) (“Coming as it does the accident and the assureds seem all but forgotten as the two insurers match clause against clause, coverage against exclusion, claim against denial, in this battle between fortuitous adversaries.”).

94 Leitner et al. at § 38:5; *id.* at §§ 38:6–38:8; Couch on Insurance 3d § 219:5 (West 2005).

95 See *Twin City Fire Ins. Co. v. Fireman’s Fund Ins. Co.*, 386 F. Supp. 2d 1272, 1278 (S.D. Fla. 2005).

96 See Couch on Insurance 3d § 219:44 (West 2005).

97 See *Twin City Fire Ins. Co. v. Fireman’s Fund Ins. Co.*, 386 F. Supp. 2d 1272, 1278 (S.D. Fla. 2005) (“If a court were to give literal effect to each of the excess clauses, each policy would be cancelled out . . .”).

98 Leitner et al. §§ 38:11–38:12; see also *Lamb-Weston, Inc. v. Oregon Auto. Ins.*, 341 P.2d 110 (Or. 1959).

99 See, e.g., *Liberty Mut. Ins. Co. v. Home Ins. Co.*, 583 F. Supp. 849, 852 (W.D. Pa. 1984) (“There is no double insurance, and hence no apportionment among insurers, if there are specific and general policies covering the damaged property. The specific policy must first pay in full, and if it is not sufficient to cover the loss, the general policy pays the difference up to the amount of the policy.”) (internal citations omitted).

100 Couch on Insurance 3d § 219:44 (West 2005) (reciting example that pastoral professional liability policy was primary over CGL policy that covered same liability); *id.* at § 219:49. The current ISO CGL Form incorporates this concept by making the CGL policy excess over certain more particularized policies. See ISO Form CG 00 01 12 07, Condition 4(b)(1)(a), (b) (“Other Insurance”); see also Craig F. Stanovich, *Other Insurance & the CGL Policy* (Apr. 2009), available at <http://www.irmi.com/expert/articles/2009/stanovich04-cgl-general-liability-insurance.aspx>.

101 ISO Form CG 00 01 12 07, Condition 2 (“Duties In The Event Of Occurrence, Offense, Claim Or Suit”).

102 ISO Form CG 00 01 12 07, Condition 2.a.

consent-to-settle provision provides that “[n]o insured will, except at that insured’s own cost, voluntarily make a payment, assume any obligation, or incur any expense . . . without our consent.”¹⁰³ In most jurisdictions, “late notice” will not jeopardize coverage, unless the insurer can establish “substantial prejudice” due to the delay.¹⁰⁴ Failure to obtain an insurer’s consent before agreeing to settle a covered third-party claim may void coverage under certain circumstances.¹⁰⁵ For these reasons, to preserve liability coverage, it is critical to review, be aware of, and comply with notice and settlement provisions in CGL policies.

WHO IS INSURED

Finally, for international corporations operating globally through complex commercial organizations, the identification in the CGL policy of the entities insured under the policy becomes a key consideration. Because a U.S. company’s overseas subsidiary or affiliate might face liability alone or in conjunction with the U.S. parent, coverage for the actions of the subsidiary or affiliate should be secured by incorporating a sufficiently broad definition of “insured” into the CGL policy and declarations. Limitations on coverage for entities newly acquired or formed during the policy period should also be analyzed, as the 2007 ISO CGL form, for example, seeks to limit coverage for newly acquired or formed organizations to a 90-day period.¹⁰⁶ If a company wants full coverage for corporate entities newly acquired or formed during the policy period, as well as all existing subsidiaries or affiliates (no matter where they operate), then the company should take care to negotiate an appropriate definition of “insured.”

CONCLUSION

As product liability lawsuits continue to mount in the United States and abroad, and as policyholders face increased risks of catastrophic litigation worldwide, careful analysis of liability coverage is necessary. Understanding the critical provisions in a company’s liability policy relevant to international product liability claims, including the products-completed operations hazard, litigation coverage territory, and product recall provisions, can help to maximize coverage and avoid pitfalls that might otherwise leave international product liability litigation uncovered. At the same time, attention to and negotiation of provisions affecting a policyholder’s right to pursue coverage from its insurers, including a policy’s arbitration, choice-of-law, and occurrence provisions, may save a policyholder substantial time and effort if and when it becomes necessary to litigate against its own insurer.

103 ISO Form CG 00 01 12 07, Condition 2.d.

104 Ostrager & Newman at § 4.02[c].

105 Ostrager & Newman at § 22.02.

106 ISO Form CG 00 01 12 07, § 11(3)(a).



PRODUCT LAW WORLDVIEW

AUTHORS

BUSINESS AND TORT LITIGATION (USA) PRACTICE CHAIR:

Paul M. Pohl
500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
+1.412.394.7900
pmpohl@jonesday.com

GLOBAL DISPUTES PRACTICE CHAIR:

Thomas F. Cullen, Jr.
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
+1.202.879.3924

100 High Street
21st Floor
Boston, Massachusetts 02110-1781
+1.617.449.6905
tcullen@jonesday.com

EDITOR IN CHIEF:

Charles H. Moellenberg, Jr.
500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
+1.412.394.7917
chmoellenberg@jonesday.com

AUTHORS:

The European Union's Product Liability and Safety Legislation

Sébastien Champagne
Boulevard Brand Whitlocklaan 165
B-1200 Brussels, Belgium
+32.2.645.15.20
schampagne@jonesday.com

Vanessa Foncke
Boulevard Brand Whitlocklaan 165
B-1200 Brussels, Belgium
+32.2.645.15.58
vfoncke@jonesday.com

Product Liability Law in France

Pierre Heitzmann
2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.46.26
pheitzmann@jonesday.com

Laurent Martinet
2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.39.59
lmartinet@jonesday.com

Marie-Laure Cartier-Marraud

2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.39.39

Edifício Plaza Iguatemi
Avenida Brigadeiro Faria Lima,
2277, 5º andar
Jardim Paulistano
São Paulo, São Paulo (Brazil)
+55.11.3018.3925
mlcartiermarraud@jonesday.com

Class Actions in Europe: Reality or Myth? The Example of France

Eric Morgan de Rivery
2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.38.69

Boulevard Brand Whitlocklaan 165
B-1200 Brussels, Belgium
+32.2.645.15.08
emorganderivery@jonesday.com

Linda A. Hesse
2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.38.72
lhesse@jonesday.com

Class Actions in Europe: Reality or Myth?

Continued from previous page

Françoise S. Labrousse

2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.39.48
flabrousse@jonesday.com

Etienne Chassaing

2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.39.35
echassaing@jonesday.com

Cynthia Tubiana

2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.39.94
ctubiana@jonesday.com

Anne-Caroline Urbain

2 rue Saint-Florentin
75001 Paris
France
+33.1.56.59.39.93
aurbain@jonesday.com

Product Liability Law in Germany

Thomas C. Mahlich

Königsallee 61
40215 Düsseldorf
Germany
+49.211.5406.5500
tmahlich@jonesday.com

Product Liability Law in Italy

Marco Lombardi

Via Turati, 16/18
20121 Milan
Italy
+39.02.7645.4001
mlombardi@jonesday.com

Giulio Novellini

Via Turati, 16/18
20121 Milan
Italy
+39.02.7645.4001
gnovellini@jonesday.com

Product Liability Law in Spain

Mercedes Fernández

Paseo de Recoletos 37-41
Planta 5ª
28004 Madrid
Spain
+34.91.520.3926
mfernandez@jonesday.com

Carlota M. Domínguez

Paseo de Recoletos 37-41
Planta 5ª
28004 Madrid
Spain
+34.91.520.3957
cdominguez@jonesday.com

Ignacio Santabaya

Paseo de Recoletos 37-41
Planta 5ª
28004 Madrid
Spain
+34.91.520.3939
isantabaya@jonesday.com

Product Liability Law in the United Kingdom

Ian F. Lupson

21 Tudor Street
London EC4Y 0DJ
United Kingdom
+44.20.7039.5109
iflupson@jonesday.com

Justin Weare

21 Tudor Street
London EC4Y 0DJ
United Kingdom
+44.20.7039.5247
jweare@jonesday.com

Product Liability Law in Australia

Philip J. Hoser

Aurora Place
Level 41
88 Phillip Street
Sydney, NSW 2000
Australia
+61.2.8272.0537
phoser@jonesday.com

Jonathan Halliwell

Aurora Place
Level 41
88 Phillip Street
Sydney, NSW 2000
Australia
+61.2.8272.0512
jhalliwell@jonesday.com

Class Actions in Australia

Peter T. Brabant

Aurora Place
Level 41
88 Phillip Street
Sydney, NSW 2000
Australia
+61.2.8272.0509
pbrabant@jonesday.com

Product Liability Law in China

Peter J. Wang

4th Floor
27 Zhongshan Dong Yi Road
Shanghai 200002
China
+86.21.2201.8040

32nd Floor, China World Office 1

No. 1 Jianguomenwai Avenue
Beijing 100004
China
+86.10.5866.1111
pjwang@jonesday.com

Product Liability Law in Japan

Takashi Tanazawa

Kamiyacho Prime Place
1-17, Toranomon 4-chome
Minato-ku, Tokyo 105-0001
Japan
+81.3.6744.1604
ttanazawa@jonesday.com

Product Liability Law in Mexico

Fernando de Ovando

Bosque de Alisos 47B, Primer Piso
Bosques de las Lomas
05120 Mexico, D.F.
+52.55.3000.4010
fdeovando@jonesday.com

Product Liability Law in Mexico
Continued from previous page

Guillermo E. Larrea

Bosque de Alisos 47B, Primer Piso
Bosques de las Lomas
05120 Mexico, D.F.
+52.55.3000.4064
glarrea@jonesday.com

**Product Liability Law in the
United States**

Charles H. Moellenberg, Jr.

500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
+1.412.394.7917
chmoellenberg@jonesday.com

Matthew A. Samberg

500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
+1.412.394.7260
msamberg@jonesday.com

Product Liability Insurance Issues

John E. Iole

500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
+1.412.394.7914
jeiole@jonesday.com

Rebekah Byers Kcehowski

500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
+1.412.394.7935
rbkcehowski@jonesday.com

Matthew R. Divelbiss

500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219-2514
+1.412.394.7297
mrdivelbiss@jonesday.com



PRODUCT LAW WORLDVIEW

BUSINESS AND TORT LITIGATION (USA)

OFFICE HEADS OF LITIGATION

ATLANTA

Richard H. Deane, Jr.

1420 Peachtree Street, N.E.
Suite 800

Atlanta, Georgia 30309-3053

(T) +1.404.521.3939

(D) +1.404.581.8502

(F) +1.404.581.8330

rhdeane@jonesday.com

COLUMBUS

Matthew A. Kairis

325 John H. McConnell Boulevard
Suite 600

Columbus, Ohio 43215

(T) +1.614.469.3939

(D) +1.614.281.3605

(F) +1.614.461.4198

makairis@jonesday.com

LOS ANGELES

Frederick L. McKnight

555 South Flower Street
Fiftieth Floor

Los Angeles, California 90071

(T) +1.213.489.3939

(D) +1.213.243.2777

(F) +1.213.243.2539

fmcknight@jonesday.com

BOSTON

John D. Hanify

100 High Street
21st Floor

Boston, Massachusetts 02110-1781

(T) +1.617.960.3939

(D) +1.617.449.6906

(F) +1.617.449.6999

jhanify@jonesday.com

DALLAS

James P. Karen

2727 North Harwood Street
Dallas, Texas 75201-1515

(T) +1.214.220.3939

(D) +1.214.969.5027

(F) +1.214.969.5100

jkaren@jonesday.com

NEW YORK

Charles M. Carberry

222 East 41st Street
New York, New York 10017-6702

(T) +1.212.326.3939

(D) +1.212.326.3920

(F) +1.212.755.7306

carberry@jonesday.com

CHICAGO

Daniel E. Reidy

77 West Wacker

Chicago, Illinois 60601-1692

(T) +1.312.782.3939

(D) +1.312.269.4140

(F) +1.312.782.8585

dereidy@jonesday.com

HOUSTON

James S. Teater

717 Texas

Suite 3300

Houston, Texas 77002-2712

(T) +1.832.239.3939

(D) +1.832.239.3777

(F) +1.832.239.3600

jsteater@jonesday.com

PITTSBURGH

Paul M. Pohl

500 Grant Street, Suite 4500

Pittsburgh, Pennsylvania 15219-2514

(T) +1.412.391.3939

(D) +1.412.394.7900

(F) +1.412.394.7959

pmpohl@jonesday.com

CLEVELAND

John M. Newman, Jr.

North Point

901 Lakeside Avenue

Cleveland, Ohio 44114-1190

(T) +1.216.586.3939

(D) +1.216.586.7207

(F) +1.216.579.0212

jmnewman@jonesday.com

IRVINE

Richard S. Ruben

3161 Michelson Drive, Suite 800

Irvine, California 92612-4408

(T) +1.949.851.3939

(D) +1.949.553.7565

(F) +1.949.553.7539

rruben@jonesday.com

SAN DIEGO

Steven N. Geise

12265 El Camino Real

Suite 200

San Diego, California 92130-4096

(T) +1.858.314.1200

(D) +1.858.314.1170

(F) +1.858.314.1150

sngeise@jonesday.com

SAN FRANCISCO**Robert A. Mittelstaedt**

555 California Street

26th Floor

San Francisco, California 94104

(T) +1.415.626.3939

(D) +1.415.875.5710

(F) +1.415.875.5700

ramittelstaedt@jonesday.com

SILICON VALLEY**Greg Lanier**

1755 Embarcadero Road

Palo Alto, California 94303

(T) +1.650.739.3939

(D) +1.650.739.3941

(F) +1.650.739.3900

tglanier@jonesday.com

WASHINGTON**Thomas F. Cullen, Jr.**

51 Louisiana Avenue, N.W.

Washington, D.C. 20001-2113

(T) +1.202.879.3939

(D) +1.202.879.3924

(F) +1.202.626.1700

tfcullen@jonesday.com