

International Product Liability Review

Issue 58

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About our Product Litigation, Compliance and Mass Torts Practice

Hogan Lovells has the leading international product liability practice covering all aspects of product liability, compliance and mass torts. We have experience of acting for clients around the world in respect of a wide range of products including food and beverages, pharmaceuticals and medical devices, cars, tobacco, mobile phones, cosmetics, electrical and electronic products, chemicals and hazardous substances, toys and children's products, sporting goods, aircraft and machinery. Hogan Lovells' product liability and product safety lawyers are supported by a dedicated Science Unit and Project Management Unit.

If you would like more information about Hogan Lovells' product litigation, compliance and mass torts practice, please visit our website at www.hoganlovells.com or contact the Product Liability Group Leader, Rod Freeman, at rod.freeman@hoganlovells.com or any of the lawyers listed on the back page of this publication.

ABOUT INTERNATIONAL PRODUCT LIABILITY REVIEW

In December 2000, Lovells (as it then was) launched its quarterly *European Product Liability Review*, the only regular publication dedicated to reporting on product liability and product safety developments in Europe for international product suppliers, and others interested in international product issues. Over the next ten years, this unique publication featured hundreds of articles, from authors across our network, covering issues in Europe and, increasingly, further afield. Reflecting the growing globalisation of product risks, and following the creation of Hogan Lovells through the combination of Lovells with Hogan & Hartson in May 2010, the publication was renamed *International Product Liability Review* in March 2011.

Hogan Lovells' *International Product Liability Review* continues to be the only regular publication dedicated to reporting on global developments in product liability and product safety regulation. It is distributed worldwide free of charge to our clients and others interested in international product issues. If you would like additional copies of this publication, please return the form enclosed with this edition, or contact a member of the editorial team by e-mail:

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1 Overview

FEATURE – SPOTLIGHT ON PRODUCT SAFETY

2 A snapshot of EU product safety reporting 2012-2014: an analysis of the rising number of product notifications via RAPEX over the past three years

Rod Freeman, Anthea Davies and Ellie Pszonka (London) report on the rise in recent years of reports of product safety risks via the EU RAPEX system. With regulators placing increasing emphasis on the enforcement of product safety laws, this trend is likely to continue. Economic operators should be diligent in ensuring their products are safe and that processes are in place to maintain product integrity.

5 UK Government announces review of the product recall system – the next step in the growing focus on enforcement

Rod Freeman (London) comments on the announcement by the UK Government of a broad-ranging review of the system for conducting consumer product recalls in the UK. Following on from a UK court levying a substantial fine against a consumer product manufacturer for failing to promptly report a product safety risk, these developments have significant implications for product manufacturers internationally.

6 Key Issues in managing global product recalls

Rod Freeman and Anthea Davies (London) comment on the key issues global product manufacturers face when undertaking a product recall in circumstances where the current global regulatory landscape is more sophisticated than ever and is set to become increasingly so in the future.

EUROPE – EU

9 Regulators write to manufacturers to highlight privacy concerns over connected devices

A recent case in the Court of Justice of the European Union held that people who rely on surveillance devices to monitor their properties in a public space will be directly responsible for

ensuring compliance with the law. Katie McMullan (London) reports on the practical impact of this decision at a time when data protection regulators are voicing concerns over the privacy issues raised by internet-connected devices, and the responsibilities of manufacturers in this area.

11 What constitutes an "article" under REACH?

Markus Burckhardt and Sabrina Schemperle (Munich) and Valerie Kenyon (London) report on a recent recommendation by the Advocate General that seeks to resolve the longstanding "component versus entire article" debate under the EU regulation Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

14 Court of Justice of the European Union rules on the significantly increased risk of failure and defectiveness of medical devices

Sebastian Lach, Ina Brock and Matthias Schweiger (Munich) review a recent judgment by the Court of Justice of the European Union examining the interpretation of defective products under Directive 85/374/EEC and of damage caused by personal injury and damage arising from implantable medical devices.

16 Market surveillance of non-food consumer products sold online

Sylvie Gallage-Alwis (Paris), Valerie Kenyon and Laurel Bray (London) report on a recently published Commission report that aims to improve market surveillance and enforcement of e-commerce safety regulations. As well as increasing cooperation between member states and national market surveillance authorities in this area, the Report's publication points to a future where non-compliance by businesses could have even more serious consequences than it does today.

EUROPE – FRANCE

19 Class actions in France: first steps

Christine Gateau and Alpha Diallo (Paris) review the developments since class actions were introduced into French law in October 2014. As well as summarising the scope of application of

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class actions under the French Consumer Code, they describe the course of proceedings in these cases and discuss the extension of class actions to other sectors.

EUROPE – GERMANY

23 Draft bill introduces new ways for consumer associations to bring representative actions

In February 2015, the German government introduced a draft bill on the right of consumer associations to bring representative actions in the interests of protecting consumer data. Matthias Schweiger and Vera Wichers (Munich) review the background to this draft legislation and consider its impact on companies, including the likelihood of higher costs and increased exposure to litigation.

EUROPE – NETHERLANDS

25 Dutch District Court elaborates on the burden of proof in product liability cases

A recent Dutch District Court decision highlighted two important areas in product liability cases: (i) the factual presumption of defectiveness and (ii) the concept of contrary evidence. Laura-Jean van de Ven (Amsterdam) summarises this judgment, which shows how a presumption of defectiveness will arise in cases where a product causes damage, even when it can be shown that the use of that product constitutes "normal use".

EUROPE – TURKEY

28 The EU Turkey Customs Union: victim of circumstance or vision of the future?

Reporting on the state of the Customs Union between the EU and Turkey, Philipp Studt (Brussels) argues that the conclusion of an updated agreement between the EU and Turkey should be a priority for both sides. This not only has the potential to unlock unparalleled trade gains, but also represents a necessary step towards creating a common European marketplace outside of the EU's political union.

EUROPE – UK

32 Inappropriate use of supporting equipment can cause goods to be in breach of implied term as to satisfactory quality

Danyal Arnold (London) comments on a recent High Court decision that considered how the use of supporting equipment can cause goods to be in breach of an implied term as to satisfactory quality in a hire agreement.

34 Welcome guidance on the interpretation and application of the Asbestos Industry Regulations 1931 and the Factories Act 1937

A recent Supreme Court decision considered the scope of application of two pieces of historic legislation on asbestos. Katie Vernon (London) summarises the judgment which established that, where a visitor to the factory had been exposed to asbestos, liability could be established against the successors to the owners of that factory.

38 Defective products: clarification on the burden of proof under the Product Liability Directive

A recent High Court decision underlines the need for care when selecting expert witnesses to help support actions in the English courts. Matthew Felwick (London) summarises this case and assesses its practical impact for parties to actions under the EU Product Liability Directive (as implemented in the UK by the Consumer Protection Act 1987).

NORTH AMERICA – US

40 Federal district court holds that state law medical device injury claims cannot be based on violations of FDA's "Current Good Manufacturing Practices"

A recent federal district court decision held that, in medical device injury actions, alleged violations of the Food and Drug Administration's federal "Current Good Manufacturing Practices" cannot form the basis of state law claims. Reviewing the impact of this decision, David J. Robbins (Washington) points out that it is a positive development for medical device manufacturers and distributors, marking a distinct step forward in

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the case law on express preemption of state law claims by federal law.

43 Guidance to consumer product companies seeking to avoid increasing civil penalties

US regulators have stated their intent to pursue higher penalties for violations of safety rules. Colleen McKnight (Houston) considers the evolving regulatory context.

ASIA PACIFIC

45 A surge of new data privacy regulation in Asia: implications for product liability law and practice

It is clear that law makers, regulators and courts in Asia are becoming more sophisticated in how they address privacy issues, with an unmistakable push towards heavier regulation and more expansive interpretations of existing laws, Mark Parsons and Peter Colegate (Hong Kong) review recent developments and warn that the risk of businesses failing to comply with data privacy laws in Asia can no longer be ignored.