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France

PRODUCT LIABILITY

Contributing firm

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This country-specific Q&A provides an overview of product liability laws and regulations applicable in France.

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FRANCE

PRODUCT LIABILITY



1. Please summarise the main legal bases for product liability

The primary source for product liability is the European Union's directive on liability for defective products (85/374/EEC), codified in articles 1245 to 1245-17 of the French civil code. French tort law is also relevant. In regard to contract law, sales law, statutory warranties and general contract law can apply. As soon as there is a case of bodily injury or lack of compliance with a specific regulation, French criminal law and consumer protection law should be considered.

2. What are the main elements which a claimant must prove to succeed in a strict liability type claim for damage caused by a defective product?

When a product is defective, its manufacturer's liability can be sought regardless of whether or not the parties have concluded a contract. Considering its strict liability regime, the claimant does not have to prove that the manufacturer committed a fault, negligence or breach of contract. Under article 1245-8 of the French civil code, the claimant must prove: the injury, the defect, and the causation between the injury and the defect. Pursuant to article 1245-3 of the French civil code, a defect exists when the product does not offer the level of safety that a person could legitimately expect. In order to assess the defect, the presentation of the product, its reasonable use and the date of its placing on the market must be taken into account. Article 1245-9 of the French civil code provides that there can be a defect even if the product was manufactured in compliance with applicable standards or was granted an authorisation to be placed on the market by the competent authorities. The French Supreme Court has confirmed that the strict liability for defective products regime falls under public policy, meaning that courts must examine the case with regards to this regime even if the claimant did not bring the claim on these grounds.

3. With whom does liability sit? If there is more than one entity liable, is liability joint and several?

Liability rests with the producer of the finished product, the raw materials or a component of the finished product, depending on which part is purported to be defective. Article 1245-5 of the French civil code defines the producer as a person or entity that places its name or brand on the product or as the person or entity that imports the product into the European Union. If the producer is unknown, the claimant may act against the sellers or importers, but they would be excluded once the producer is known. If a judgment is entered against the seller or the importer, they may bring a claim against the producer for reimbursement. Joint and several liability is possible when there is a defective product incorporated in another product.

4. Are any defences available? If so, please summarise them.

France's implementation of the European directive on liability for defective products (85/374/EEC), at article 1245-10 of the civil code, allows for five defences: the product was not placed on the market, the defect did not exist when the product was placed on the market or caused afterwards, the product was not intended for sale or distribution, the technical or scientific knowledge at the time the product was placed on the market did not permit awareness of the defect (development risk defence), and the defect is due to mandatory regulatory or legislative requirements. If multiple producers are involved, it is possible to distinguish between the final manufacturer and the component's manufacturer.

5. What is the limitation period for bringing a claim?

The criterion of the claimant's knowledge is key when it comes to determining whether a claim is time-barred. Articles 1245-15 and 1245-16 of the French civil code

provide for a double limitation period for products placed on the market after the entry into force of the law dated 19 May 1998 which implements the European directive on liability for defective products (85/374/EEC): the claim must be brought within three years from the moment when the claimant is aware or ought to have been aware of the defect, the identity of the manufacturer and the existence of the injury, the claim must be brought within ten years after the product was placed on the market.

6. To what extent can liability be excluded (if at all)?

Liability may be reduced or excluded depending on the facts of the case: if the injury was caused conjointly by a fault of the claimant, or by the fault of a third party under the claimant's responsibility, such as minor children or employees. The producer's liability can only be totally excluded if the latter can prove that the claimant's fault was unforeseeable and irresistible (as in force majeure cases). It is not possible to limit or exclude liability for the acts of third parties that are unrelated to the claimant and conjointly caused the injury. However, the producer can bring an indemnity claim against the third party whose actions caused the damage.

7. What are the main elements which a claimant must prove to succeed in a non-contractual (eg tort) claim for damage caused by a defective product?

Claimants may bring claims based upon fault, including negligence, or because of the custody of a "thing" (any type of product). In cases of fault or negligence, the claimant must prove: that it has suffered an injury that may be compensated, that the defendant engaged in either negligence or other intentional tortious conduct, and that there is causation between the injury and either the negligence or intentional tortious conduct. In cases involving damage because of the custody of a product, the claimant must not prove a fault or negligence as it falls under a strict liability regime. The claimant must prove: that there is an injury that may be compensated, a thing that is not excluded by special legislation, an injury caused by the thing either in movement or by being in an abnormal state, that the thing is under the control of someone. A thing will be considered to be in a party's custody if the latter has kept the power to use it, has retained control over it and manages it.

8. What types of damage/loss can be compensated and what is the measure of

damages? Are punitive damages available?

French law provides for compensatory damages with the primary objective of fully compensating the entire damage, but only the damage claimed. As such, punitive damages are not allowed under French law. Examples of losses commonly compensated include material losses, damage to reputation or moral damage, pain and suffering related to bodily injuries, loss of profit, etc. The damage must, however, be direct, certain and determined. Recently, the French Supreme Court ruled that pure economic damage suffered by a winegrower because of the alteration of its wine's taste could be compensated given that the Court of Appeal had noted that the wine has deteriorated as a result of its pollution by the products claimed to be defective. (French Supreme Court, 9 December 2020, case no 19-17.724). In order to be compensated, the claimant must prove all the elements above-mentioned.

9. How are multiple tortfeasors dealt with? Is liability joint and several? Can contribution proceedings be brought?

If there are multiple tortfeasors, they may all be held liable. Joint and several liability is allowed if it is provided by law or contract. The claimant can sue any of the tortfeasors, whether only some of them or all of them. After the claimant has been compensated, contribution proceedings between tortfeasors may be brought independently.

10. Are any defences available? If so, please summarise them.

With regard to negligence or intentional tortious conduct, the following defences are available: force majeure (an extraneous event that was unforeseeable and insurmountable), an intervening act by a third party, or the fault or misconduct of the claimant. In cases of damage linked to the custody of a thing, the owner of the thing is presumed to have control over it. It is however possible to demonstrate that control was transferred to someone else at the time of the injury.

11. What is the limitation period for bringing a claim?

Claimants may bring a claim within five years from the date that the claimant knew or ought to have known that he or she had a claim. However, the limitation period is extended to ten years for claims related to bodily injury

or damage caused to the environment.

12. To what extent can liability be excluded (if at all)?

Liability may be excluded in the following circumstances: force majeure (an extraneous event that was unforeseeable and insurmountable), an intervening act by a third party, or the fault of the claimant. In cases where the claimant committed a fault, it may lead to either a full exclusion or partial exclusion of liability.

13. Does the law imply any terms into B2B or B2C contracts which could impose liability in a situation where a product has caused damage? If so, please summarise.

Yes, in cases where the ownership of a product has been transferred through multiple contracts, the subsequent purchasers or owners may seek liability on either breach of contract or the statutory warranty against hidden defects. In order to bring a claim for breach of contract, the claimant must demonstrate: a breach of contract, an injury that may be compensated, and causation between the breach and injury. Delivering a product that does not comply with the specifications of the contract is generally considered to be a breach of contract under French law. For claims under the statutory warranty against hidden defects, the buyer must prove: that the defect was unknown at the time of sale, and that the defect either renders the product unfit for its intended use or limits its usefulness to the point that the buyer would not have made the purchase for the same price in similar circumstances.

14. What types of damage/loss can be compensated and what is the measure of damages?

In contract law, damages may be awarded up to the amount that is reasonably expected under the contract. If there is a valid clause limiting liability it will be given full effect by the French courts. Depending on the contract and provided that the losses are direct, certain and determined, French courts generally grant damages for material loss, loss of reputation or moral loss, loss of profit, loss of opportunity.

15. To what extent can liability be excluded for contract liability (if at all)?

Contractual liability may be excluded if the defendant

can prove: force majeure (an extraneous event that was unforeseeable and insurmountable), an intervening act of a third party, or a contributory negligence or fault of the claimant. In cases of contributory negligence or fault by the claimant, liability may be partially or fully excluded. However, for the statutory warranty against hidden defects, French courts make it more challenging to exclude or limit liability.

16. Are there any recent key court judgements which have had a significant impact on the approach to product liability?

On 27 November 2019, the French Supreme Court (case no. 18-16.537) ruled on a number of product liability issues linked to allegations that the medicine Depakine could be at the origin of birth defects. The Supreme Court stated that the limitation period can only start once the claimant knew or could have known the origin of the damage and the identity of the producer at stake. It ruled that the claimant was not time-barred as the claim had been filed within 3 years following the conclusion of expert operations carried out to determine whether the birth defect was due to genetic anomalies or the medication at stake and that the producer could not claim that the claimant could have known of the potential link earlier. Conversely, the Supreme Court ruled that the producer should have known earlier that there could be an issue with one of the ingredients of its medicine and should have warned consumers accordingly. On 11 April 2019, the Lyon Court of Appeal (case no. 17/06027) ruled on the Monsanto relating to the herbicide Lasso. In 2017, the Supreme Court asked the Lyon Court of Appeal to determine whether or not the conditions of the strict liability regime were met and should be applied. In its 2019 decision, the Lyon Court of Appeal ruled that Monsanto is liable for not having sufficiently warned users of Lasso of its potential dangers, stating that the instructions for use are not detailed enough and that the technical knowledge of the claimant involved could not excuse the lack of sufficient information from Monsanto. On 21 October 2020, the French Supreme Court put an end to the Monsanto case (case no 19-18.689) by confirming Monsanto's liability. The Court stated that Monsanto did not sufficiently warn about the specific danger associated with working on or in tanks and containers. Moreover, according to the Court, the lack of security was increased by a labelling that does not comply with the applicable regulations. This is an important decision as it shows that courts consider the duty to inform and the duty to warn as not being necessarily met despite the fact that the product at stake had been granted an authorisation to be placed on the French market by the authorities. On 5 April 2019

(case no. 18-17.442) and 11 September 2019 (cases 17-24.879 to 17-25.623), the Plenary Assembly of the French Supreme Court ruled that any employee who considers that he/she has been exposed to a hazardous substance which triggers anxiety to develop a disease in the future can file a claim for damages on the ground of such a risk. This “anxiety damage” was first recognised in claims related to exposure to asbestos. It has also been recognised in the scope of claims linked to medical devices. Last year’s case law should be at the origin of claims linked to other substances and products.

17. What are the initial litigation related steps you should take if you are facing a product liability claim or threatened claim?

When facing a product liability claim or threatened claim, it is important to take the following first steps: Assess the procedural aspects: was the claim properly filed, does the court have jurisdiction, is the claim time-barred, is the entity sued the producer, etc. Understand the scope of the claim: is this a serial defect or an isolated issue? Is the issue related to a specific component or ingredient or to the overall product? How many products have been sold? Have they been sold worldwide? Are there other similar claims in other jurisdictions? The understanding of the scope of the claim should help assess the potential overall damages that the claim can trigger Gather all the information that was provided to retailers, distributors and/or consumers together with the product Gather the history of the product (different versions of the product, changes in the instructions for use, incident reports, etc.) Gather information on the claimant and its Counsel and determine if they are members of associations, federations, groups and if this is a test case before mass litigation is initiated.

18. Are the courts adept at handling complex product liability claims? Are cases heard by a judge or jury?

French civil and commercial courts frequently hear complex cases, including product liability claims with an international reach. However, group actions are relatively new and there are difficulties relating to group action procedures. If the case is brought before the civil courts, it will be heard by a single judge or a panel of career judges. If the case is brought before the commercial courts, the case will be decided by a single lay judge or a panel of lay judges who are elected by representative bodies of companies or individuals engaged in commercial activities. At the appellate level, cases are always heard by career judges. Juries are not

used for such claims in France (they are used for very serious criminal offences).

19. Is it possible to bring a product liability related group action? If so, please summarise the types of procedure(s) available

France has decided to implement a collective redress mechanism, which focuses on specific sectors and can expand together with the types of issues that may be raised against companies. A “class action” for consumer claims was first created in 2014, together with competition-related class actions (“follow-on actions”), before specific class action schemes were introduced for discrimination, health and cosmetics, environment and data privacy related issues. All mechanisms are opt-in actions. In order to bring a group action, at least two individuals placed in a similar situation will need to request an approved consumer association to take the case and represent the group. The association will then bring the claim to court on the group’s behalf. Depending on the type of mechanism at stake (consumer or health for instance), there are specific associations that can launch such claims. The court will first rule on the merits of the case and on the liability of the defendant. If damages are awarded, the non-profit group will take charge of managing the group, collecting the necessary information and distributing the individual damages awards with the court’s approval.

20. How are cases typically funded? Can lawyers charge success fees? Is third party funding permissible?

Generally, cases are funded by the clients. Under the professional ethics rules for lawyers, success fees that equate to all legal fees are prohibited. However, it is possible for the client to agree to a success fee in addition to the regular legal fees depending on the services provided or outcome of the case. Third party funding is not prohibited in France, but it is not a common practice yet. For lawyers, the main difficulty relates to professional responsibility rules, which require that payment only come from the client and that confidential information about the case may not be shared by the lawyer to persons who are not the client.

21. How common are product liability claims and what factors influence their frequency?

Product liability claims are increasingly rising. This is due

to a number of factors: the communication made by consumer associations via social media the increasingly pro-claimant case law of the European court of justice and of French courts where civil liability rules are commonly disregarded to facilitate the proof of an alleged defect by the claimant the internationalisation of such claims: as soon as there is a claim in one European jurisdiction or in the United States, parallel similar proceedings are launched in France the increased powers of the French market surveillance authority the increase of the maximum potential fines in case of a breach: for instance, the maximum fine for deceit is now €1.5M while it was €300K before for corporations

22. What are the likely future developments in product liability law and practice? To what extent is the suitability of the law being challenged by advances in technology?

The European authorities are actively working on a new product liability regulation aimed at taking into account the fact that products are now, for most, linked to technology and wireless services. On 12 February 2020, the Commission further issued a resolution entitled 'Automated decision-making processes: Ensuring

consumer protection, and free movement of goods and services', which notably highlights the need to update current rules.

On 26 May 2021, the EU Medical Device Regulation 2017/745 of the European Parliament and of the Council of April 5, 2017, will become fully applicable. The manufacturers will have to comply with this new legal framework as the obligation of implementing a risk management system and the obligation to conduct clinical evaluations.

23. Please provide an update of any interesting developments which have taken place in your jurisdiction over the last 12 months.

The most relevant recent update is the French Supreme Court decision putting an end to the Monsanto case (French Supreme Court, 21 October 2020, case no 19-18.689). By confirming Monsanto's liability, this decision sets up the framework of the herbicide manufacturers' liability under French law. This decision states, inter alia, that the causal link between the damage and the defectiveness of the product may be proved by sufficient reliable and consistent evidence.

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