

Winners and losers under liability law

Until recently, Thailand had no comprehensive law directly addressing product liability issues. As a result, claims for product liability in Thailand were usually made through use of the Consumer Protection Act and the Civil and Commercial Code. But these laws were viewed as inadequate to protect consumers and to deter the sale of unsafe products.

In addition, there was a general belief that the sale of unsafe and substandard products was widespread in Thailand, highlighted by various incidents in which people sustained serious injuries from defective products. Although it is debatable how much of the problem is related to the lack of comprehensive product liability laws, nonetheless it was hoped that implementation of specific product liability legislation in Thailand would help alleviate these concerns.

The Product Liability Act B.E. 2551 (2008) was approved by the National Legislative Assembly in December 2007. The Act is designed to protect consumers who incur damage from defective products by imposing liability on those involved in the production and distribution of consumer products. The Act has been published in the Government Gazette and will become effective on February 20, 2009.

The Act imposes strict liability on a business operator involved in the manufacture and/or sale of a defective product that then causes harm to a user. The Act defines an operator as any producer, outsourcer, or importer of the defective product; a seller who cannot identify the manufacturer, outsourcer, or importer of the product; and a person using the trade name, trademark, logo, wording, or showing by any means in a manner to cause people to understand that he/she is a producer, an outsourcer, or an importer. Thus, anybody involved in the chain of production and distribution could potentially face liability should the product sold contain a defect that causes harm to consumers.

The operator is held liable if the product is defective within the meaning of the Act, regardless of whether the operator was negligent in making or selling the product. In other words, the operator can still be liable even if he/she has exercised reasonable care.

Generally speaking, the Act addresses three specific types of product defects: manufacturing defects, design defects, and warning defects (failure to warn). Manufacturing defects occur where a product deviates from its intended design or specifications, while design defects occur when the product design itself renders the product dangerous or unsafe

for its intended use. Warning defects refer to situations in which directions for use or storage, warnings, or information about the product are not provided, or are provided but are not reasonable given the nature of the product and the ordinary usage/storage that may be expected of the product.

Under the Act's strict liability rule, an injured user need only prove that he/she was injured or suffered damage from the defective product while using it in the way it was intended to be used. The injured party does not have to establish that the damage was the result of an act of any particular operator involved.

Moreover, product liability cannot be waived or limited by way of contract or by any waiver or limitation of liability statement given by an operator. Further, if a court finds an operator liable, the scope of damages available to an injured party may be broader than those available under traditional tort or contract theories. For example, under the Act a court has the discretion to award punitive damages and compensation for mental anguish if required conditions are met.

While the Product Liability Act introduces the strict liability standard, it also provides several defences for a defendant operator. For example, an operator will not be liable if it can prove that the product was not defective, that the injured party was already aware that it was defective but used it anyway, or that the damage was due to improper use or storage of the product.

The Act also provides defences for producers of custom-made products and component producers, who generally will not be liable for the damage to consumers if they can prove that the defect is due to the specifications or design of the final product provided to them by the outsourcer or producer.

With implementation of the Act less than one year away, operators are advised to begin planning now. Companies that manufacture, sell, import, or even those who license technologies or trademarks to others for production, import, or product sales, should carefully assess litigation risks and related costs.

In addition, operators should conduct evaluations and reviews of their quality control processes, product designs, and consumer warnings. It is also advisable for companies to consider and evaluate the need for product liability insurance.

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