

Product liability law: impact and practice

Product-liability laws in the United States and Europe serve as a powerful warning to parties who introduce defective products into the marketplace that they will be held accountable for their failure to ensure that products are safe.

While implementation of such laws benefits product users, stories of financial ruin or hardship, particularly to small and medium-sized businesses, abound. There is a fear that the proposed Product Liability Act will lead to an explosion of western-style product liability litigation and multi-million-baht damage awards, driving up the cost of doing business and reducing the competitiveness of Thai businesses. But are these fears reasonable?

In this, the second of a two-part series on the draft act, we focus on its projected impact on the Thai business and legal community, with specific emphasis on similarities and practical differences with the western product-liability model.

Service as Product: As noted in part one on April 7, the Act broadly defines the scope of products subject to strict liability protection, which even extends to "services". There is concern from some business operators that the definition of "services" is subject to overly broad interpretation, that it is too difficult to ensure safety for services, and that traditional tort remedies adequately protect parties injured from negligently provided services.

Increased availability of damages: The Act also significantly changes what damages are available to plaintiffs by allowing claims for mental damages, not just to a party directly injured by the defective product, but also to those indirectly damaged, such as surviving family members of the deceased. Further, the Act's acceptance of cumulative class action awards and punitive damages, historically unavailable, will provide further incentive for parties to file cases.

However, it should be noted that such awards, while expected to be higher than those available under traditional tort theories, will likely be less than in the West, limited by a punitive damages ceiling of four times actual damages.

Class actions and contingency fees: The Act provides a means by which injured parties can join together in litigating product-liability actions. To provide an incentive for attorneys, they may accept cases on a contingency-fee basis of up to 30% of actual recovery. In theory, attorneys will assess the viability of claims and may invest their own funds in preparing a case that they believe has merit and potential for a reasonable

reward, thereby providing access to the courts for parties who may not normally seek to litigate their claims.

Practical applications: So, while the Act adopts the general principles of product-liability laws in Western models, differences in application of the law in Thailand, the judicial system, and Thai culture itself, will likely contribute to different practical outcomes. This has been the case for Japan, which has largely adopted the US model, but has not seen an explosion of product-liability cases.

For example, although Thailand has a well-developed civil claim system and thousands of talented attorneys, there has been historically less cultural and political emphasis on litigation than in some western jurisdictions. In addition, Thai courts do not utilise pre-trial discovery, as parties are generally responsible for preparing and presenting their own evidence, or must otherwise request court assistance to subpoena documents or witnesses.

Of particular importance is the fact that Thai judges, and not sympathetic juries, will decide liability cases. Judges tend to be more conservative than juries and are less likely to issue disproportionate damage awards. In addition, court awards of attorney fees are considerably less than those found in most Western jurisdictions, so despite the availability of contingency-fee agreements, parties have a greater burden of risk in funding disputes through a full trial.

Finally, the Act will not apply retroactively. Only products sold after establishment of the Act will be subject to its provisions. While the Act will certainly promote the increased use of the courts in litigating liability claims, the scope of its initial use will likely be less than that observed in the West.

The Act presents both an opportunity and a challenge for product users and producers alike. Injured users and their representatives will now gain easier access to the courts. Producers will face some increased costs, such as insurance, but may also benefit through the promotion of safer products and through technological advancements. With proper business planning and legal guidance, we believe that Thai business will adapt and may ultimately benefit from implementation of the Act.

Michael Ramirez is a consultant and Thawat Damsa-ard a partner with the Dispute Resolution Department at Tilleke & Gibbins International Ltd. Please send comments and suggestions to Marilyn Tinnakul at marilyn@tillekeandgibbins.com