



Current Articles 2007 – February

Product Liability in the U.S.A.

Cross-border trade between Canadian Manufacturers and the U.S. market has increased dramatically in the last decade. I recently received a very interesting 10-page article, which highlighted many of the differences, and problems that can be incurred by our Canadian insureds. One major problem is that in the U.S. it may be the court of the territory where the manufacturer knew or could reasonably foresee that its product would be purchased, used or consumed may be able to take jurisdiction over a claim suffered in that territory as a result of an alleged product defect.

There is no singular “U.S. Legal system” with common procedures. There is a federal court system and a state court system, which often will overlap each other. The federal court system includes the U.S. Supreme Court, 12 Federal Courts of Appeal and 94 Federal District Courts. In addition each state has its own state court system, which includes trial courts and appellate courts. Therefore decisions and awards will vary extensively depending on the jurisdiction of the case being presented.

One of the major differences is with regard to General Damages or awards for pain and suffering. In Ontario, and as a result of three catastrophic personal injury cases in 1978 (which became known as “the Damages Trilogy”), the Supreme Court ruled that non-pecuniary general damages for personal injuries should not exceed \$100,000 per claimant. As a result of inflation, this “cap” has risen to just over \$300,000. In the U.S. there is no cap on general damage awards... The amount is left to the “trier of fact” which is usually a jury. For a product liability award the “sky is the limit” in the U.S! This is significantly important and most applicable in a product liability claim against a foreign manufacturer. Although damages may be reduced on appeal they are still tend to be higher than those in Canada.

Another major difference is awards for punitive damages in the U.S. In the past few years we have seen an increase in punitive awards in Canada with some reaching as high as \$2.5 million (Mazza v. Hamilton Township Farmers’ Mutual Fire Insurance Co. In the U.S., punitive awards are common particularly in product liability cases, and can be very high. In 1996, the U.S. Supreme Court a jury awarded \$4,000.00 for compensatory damages and **\$4 million for punitive damages**. On appeal the punitive was reduced to \$2 million.

A plaintiff brought an action against State Farm and a jury awarded \$2.6 million in compensatory damages and a punitive award of **\$145 million**. On appeal these amounts were reduced to \$1 million and to \$25 million. However the Utah Supreme Court **reinstated the U.S. \$145 million punitive damage award!**

Some states require the appellant in a case to post a bond for the full amount of the judgment. In many cases this may not be a problem but what about cases that have been awarded enormous settlements in the lower court. In 2003 an Illinois county court held Philip Morris U.S.A had

deceived smokers about the dangers of "light" cigarettes for a number of years and awarded damages of **\$10 billion**. Philip Morris appealed but the court required it to post security for the entire amount of the judgment. Philip Morris asked the court to reduce the bond amount as this amount could potentially push the company into bankruptcy. The trial judge agreed to reduce the amount to \$6 billion. Claiming that the trial judge lacked authority and the bond requirement was reinstated to **\$12 billion**. The Illinois Supreme Court set aside this order and reduced the bond requirement to only \$6.8 billion.

There are other differences with regard to Cost Awards, procedures for Pre-Trial Examination for Discovery and to the legal tests of liability i.e. Negligence v. Strict Liability. In U.S. law it is almost inevitable that strict liability laws will apply to a product liability case and thereby removing the "due diligence" defense.

Your Canadian clients who export to the U.S may not understand these substantial differences. What limits are they carrying? Has higher limits been recommended? Is your client aware that the CGL does not cover punitive damages? The minimum advice would be to make your clients aware of these differences, particularly with regard to the need for a bond for the right of an appeal, and to advise of the availability or the lack of, with written evidence of your discussions or recommendations.

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