

**REPORT ON THE NATIONAL LAW CENTER FOR INTER-AMERICAN
FREE TRADE'S MIAMI CONFERENCE ON PRODUCT LIABILITY**

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I. INTRODUCTION

Significant changes in the law governing products liability claims against foreign manufacturers and exporters in Latin America demand the attention of U.S. companies, their counsel, and insurance carriers. Leading experts from the United States and Latin America arrived at this conclusion following a two-day conference in Miami, Florida, sponsored by the National Law Center for Inter-American Free Trade (NLCIFT) on September 20 and 21, 2001. The conference, which I had the privilege of chairing, followed a two-year analysis of Latin American product liability law and litigation conducted by the NLCIFT. Coupled with important procedural changes, developments discussed at the conference may require a reassessment of liability risks.

With the assistance of a grant from the Shook, Hardy & Bacon law firm headquartered in Kansas City, Missouri and the Phillip Morris Company, the NLCIFT conducted a two-year product liability project. The purpose of the project was to examine the potential impact of product liability law and procedure in Latin America on U.S. manufacturers and exporters. Uruguayan attorney Alejandro Hernández Maestroni, of the Montevideo firm of Ferrere Lamaison, served as the principal researcher. The NLCIFT's written analysis, which covers a cross section of Latin American countries, will soon become available to its members.

The Miami conference gathered leading attorneys and scholars from throughout the Americas to present and discuss recent developments in product liability law. The information presented is of particular interest to U.S. companies and attorneys who may become involved in product liability claims arising from incidents in Latin America. The conference focused on the current and future status of such claims, how and where they are litigated, and the actual results. The conference examined the rise of litigation in U.S. courts stemming from incidents involving allegedly defective products in Latin America; it also compared U.S. law and procedure to Latin American law and procedure. Attention also focused on liability insurance issues, as well as the potential role of arbitration and mediation in resolving product liability claims. U.S. business executives presented their perspectives and discussed their concerns. Special emphasis was placed on the application of practical situations and the analysis of recent cases. The conference concluded with a discussion about the feasibility of uniform or model laws regarding product liability claims in the Americas.

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II. PRODUCT LIABILITY REMAINS A HOT TOPIC

Latin American product liability law has become a "hot issue" for several reasons. First, the increase in trade between the United States and Latin American countries means increased product circulation and correspondingly, greater potential for injury and litigation. Next, primarily through the passage of consumer protection laws, many Latin American national legislatures, courts, and legal writers advocate the broadening of consumer rights to recover damages in product liability claims. The counter argument emphasizes a concern regarding the potential adverse economic impact on local and foreign companies resulting from increased litigation, such as discouraging investment and commerce. Finally, efforts to bring lawsuits in the United States in order to take advantage of its jury system, liberal pre-trial discovery, punitive damages, and contingent fees contributes to the importance of product liability law in Latin America.

III. HISTORY AND RECENT TRENDS

The historic approach of the civil law countries of the Americas made recovering damages for product defect cases difficult, and the awards have traditionally been small by U.S. standards. Except in limited circumstances, the Americas did not recognize strict liability without proof of fault. When awarded, damages were limited in scope and amount. The absence of juries and the prohibition against punitive damages has also kept awards at modest levels. Contingent fees were not permitted, and pretrial discovery was limited.

In recent years, however, a number of factors have altered the legal landscape in ways that raise concerns for U.S. companies exporting or manufacturing products for the Latin American market. First, legislation in several countries has modified traditional approaches by treating product liability claims as distinct from other tort claims. These laws are generally denominated Consumer Defense Laws and affect the responsibility of manufacturers, distributors, and retailers. Moreover, the writings of Latin American legal scholars who advocate changes in product liability law are influential in shaping judicial approaches to product liability claims.

Another trend, which signals a discernible shift away from proving fault or *hecho ilícito*, is to base liability on the existence of an injury caused by the product. In some Latin American countries, the doctrine of *hecho ilícito* has all but disappeared in product liability cases. In other countries, it continues to be required, but there are several exceptions for enumerated products, especially those considered inherently dangerous.

Legislation, judicial decisions, and legal scholars have also developed the concept of objective responsibility or *responsibilidad objetiva*, to eliminate the negligence or *culpa* requirement. Several countries have adopted this approach, and although the MERCOSUR countries have not, it appears in a MERCOSUR

proposal. It also enjoys the support of the presidents of these countries.

Another trend involves the modification and blurring of the distinction between contractual and extra-contractual liability to permit suits by consumers with no direct contractual relation to the manufacturer. Also, the burden of proof shifts to the manufacturer to prove absence of defect in certain circumstances. While these doctrines are not derived from U.S. law, they maintain many similarities to the U.S. common law system of strict liability.

The availability of traditional defenses varies among individual countries. For example, compliance with state of the art design and manufacture is recognized as a defense in some countries, but not in others. Compliance with government regulations and industry standards likewise exists as an appropriate defense in some areas, but not in others. Causation arguments, such as misuse, abuse, or unintended use are widely recognized. Some Latin American countries have developed procedures for establishing industry-wide liability. On a limited basis, cases that are similar to U.S. class actions may be permitted.

Most Latin American countries allow full compensatory damages for actual past and future economic loss, although awards are much lower than in the United States. The doctrine of *daños morales* or moral damages is similar to damages for pain and suffering in the United States. Punitive damages are not recoverable, although to an increasing extent, some courts allow consideration of the defendant's conduct as part of moral damages.

The Center's study and the Miami conference make clear that important changes in law and procedure have occurred and will continue to occur, and that these changes will vary significantly from country to country. The NLCIFT's findings assist U.S. businesses and attorneys in keeping abreast of these far-reaching developments.

IV. LIST OF PRESENTATIONS AT THE MIAMI CONFERENCE

All the presenters at the Miami conference are considered preeminent experts in their respective fields, and their insights and conclusions provide a unique contribution toward solutions to the difficult and controversial issues in this rapidly expanding area of litigation. An outline of the program follows:

- I. An overview of product liability law in Latin America today was presented by Jorge Mosset Iturraspe (Estudio Jurídico Mosset Iturraspe, Santa Fe, Argentina) and Alejandro Hernández (Ferrere Lamaison, Montevideo, Uruguay);
- II. An overview of Latin American court systems and procedures was presented by Alberto Molinario (Marval, O'Farrell & Mairal, Buenos Aires, Argentina);
- III. U.S. product liability law, procedure, and practice was compared and contrasted with that of Latin America by Sara D. Schotland (Cleary,

- Gottlieb, Steen & Hamilton, Washington, D.C.);
- IV. Jurisdiction, service of process, and enforcement of judgment issues in actions against U.S. companies or subsidiaries in U.S. and Latin American courts was discussed by William D. Wood (Fulbright & Jaworski, Houston, Texas);
 - V. The practical aspects of defending product liability claims against U.S. companies or subsidiaries in the courts of Latin America was covered by Luiz Pérez (Shook, Hardy & Bacon, Miami, Florida); and Luiz Migliora (Veirano and Associates, Rio de Janeiro, Brazil);
 - VI. From both the plaintiff's and defendant's standpoint, practical aspects of litigation in U.S. courts of products liability cases arising in Latin America, including issues of jurisdiction, forum non-conveniens, and discovery, was presented by José Astigarraga (Astigarraga Davis, Miami); Victor Diaz (Podhurst, Orseck, Miami); and Doug Seitz (Snell & Wilmer, Phoenix, Arizona);
 - VII. The role of government and legislation in Latin American product liability claims was presented by José Ramón Ximénez Carbo (Attorney General of Ecuador); María Augusta Cueva (Counsel to Attorney General of Ecuador); and Alfredo Bullard (INDECOPI, Lima, Peru);
 - VIII. Practical issues involving insurance coverage for product liability claims arising in or from Latin America were reviewed by Tim Moerschel (AIG, Tampa, Florida);
 - IX. The use of arbitration and mediation in resolution of product liability claims was discussed by Diana Droulers (Secretary General, ICC, Venezuela and Arbitration Center of the Caracas Chamber of Commerce);
 - X. A "view from the board room," setting forth the concerns of U.S. exporters and manufacturers in regard to product liability claims from Latin America was presented by Jay Fox (Foxco International, Cherry Hill, New Jersey); and
 - XI. The potential for developing uniform principles or model laws regulating product liability law and litigation in the Americas was discussed by Victor Schwartz (Shook, Hardy & Bacon, Washington, D.C.).

John Molloy, retired Arizona judge and secretary of the National Law Center for Inter-American Free Trade's Board of Directors, served as reporter for the Conference and provided summaries of the presentations.¹

1. For a general overview regarding civil procedure and litigation in international commercial disputes, see generally UNITED STATES LAW OF TRADE AND INVESTMENT, chs. 7, 16 (Boris Kozolychik & John F. Molloy eds., 2000).