



German Exporters: How To Control US Product Liability Risk

For many companies, product liability is an irritating term, especially when it comes to the US market.

We frequently hear about product liability lawsuits before US courts in the media, but only the most bizarre and drastic cases seem to make the headlines. These are cases in which, for instance, plaintiffs claim enormous amounts of damages compensation.

September 2018, Dr. Thomas Rinne

What happened?

A particularly interesting and recent case is the San Francisco jury verdict in *Dewayne Johnson v. Monsanto Company*. The court ordered Monsanto to pay a total amount of US\$ 289 million (US\$ 250 million in punitive damages and US\$ 39 million in compensatory damages and costs). The jury found unanimously that Monsanto's glyphosate-based Roundup weed killer caused Mr. Johnson to develop a deadly cancer, and that Monsanto had deliberately failed to warn the public of the product's inherent dangers. Monsanto will have to lodge an appeal against the jury verdict and it may take several years until the final outcome will be known. The press usually only reports on the verdict of the jury and not on the final result of the case once it has gone all the way through the court system. A very instructive example as to how the jury verdict and the final judgment may significantly differ is the case *Robinson v. R.J. Reynolds Tobacco Co.*

In 2006, Cynthia Robinson, the widow of a chain smoker who died of lung cancer, sued cigarette manufacturer Reynolds in Florida for damages. The jury awarded her more than 23 billion US\$. Cynthia Robinson argued that the tobacco industry was aware of the harmfulness of tobacco consumption but had long kept quiet and advertised cigarettes in a trivial manner with full knowledge of the health risks. In the USA, there are also "punitive" damages in addition to conventional damages, which explain such a

high award. The actual (also called compensatory) damages amounted to only 16.9 million US\$. US courts allow punitive damage awards in certain cases to deter future similar conduct, as opposed to compensatory damages, which are only intended to compensate the plaintiff for his or her injury.

In Germany, the Spiegel magazine reported on this case in 2014. However, its reporting failed to emphasize the fact that the award by the jury was reviewable in the US court system, so this high award was not the ultimate outcome of the case. Six months later, the district court overturned the verdict on punitive damages. The district court reduced punitive damages from 23.6 billion US\$ to 16.9 million US\$ (!), and subsequently the higher court granted a new trial. US Supreme Court decisions have often clarified that punitive damages should typically be limited to no more than 10x compensatory damages unless there has been particularly egregious conduct. Little has been reported on the drastic reduction in punitive damages in this case even in the US media but also in Germany.

This example shows that product liability risk in the USA is often exaggerated. However, an exporter must of course be mindful of product liability risks in the USA and should take appropriate measures to reduce them. The good news is that a punitive damages award before German courts is not possible. Such US judgments cannot be enforced in Germany (as opposed to an award of conventional or compensatory damages).

Typical Product Risks

Claims for damages can be based on

1. Construction defects,
2. Defects in the manufacture of a product,
3. Unsuitable operating instructions and warnings, and
4. Insufficient product monitoring.

Exporters can reduce the risk of being held liable for damages due to product defects in the USA if they are made aware of, minimize, and ideally avoid typical product defects.

In the USA, the following categories of product defects are distinguished:

- **Design or development defects:**
Products may have been incorrectly designed or developed, for example, because they do not correspond to the current "state of the art".
- **Manufacturing defects:**
If a defect occurs in the manufacturing of a product that is designed without defects per se, it is referred to as a manufacturing defect. Individual products or an entire series of products may be affected.
- **Incorrect operating and warning labels (marketing defects):**
The manufacturer must provide the user or consumer with accurate and easy-to-understand operating instructions (instructions for use). In the USA, the instructions must be provided in English and usually also in Spanish. The manufacturer must warn the user or third parties about any goods that may become dangerous if used as intended. If the operating or warning labels are not formulated accurately and clearly, it could be considered a product defect.
- **Insufficient product monitoring:**

Even after the manufacturer has launched its product on the market, it is required to continue to monitor the product's performance. For example, if there is a sufficient number of complaints indicating that a product defect is present and posing a potential risk to the user or third parties, then the manufacturer must actively intervene (usually a product recall and, if necessary, an adjustment of the product are advisable). Violation of these requirements can trigger product liability.

Recommended Procedure

Prior to the first distribution of products in the USA, it must be carefully examined whether and, if so, which approval requirements must be complied with. In this context, operating instructions must also be checked for their suitability for the US market. A mere translation of German operating instructions into English or Spanish is not sufficient because warnings with symbols may have to be used, which are defined by various US organizations depending on the product. Examples include OSHA (Occupational Safety & Health Administration), NEMA (National Electrical Manufacturers Association), UL (Underwriters Laboratories) and ANSI (American National Standard Institute).

In most cases, the establishment of an independent US company as a distributor is also recommended. The German product manufacturer may nevertheless be held liable in Germany for a product defect. However, if there is a US sales company that is legally interposed, a US plaintiff will generally first take legal action against the US company for procedural and cost-related reasons. This is not least because, unlike in Germany, American plaintiff attorneys often handle such lawsuits on a contingent fee basis. As a result plaintiffs do not incur comparably significant amounts in legal fees.

When drafting distribution agreements with US partners, care should be taken to shift liability to the US distribution partner to the greatest extent possible. This must be done by taking out product liability insurance policies on the part of the manufacturer and the US distributor.

Our risk management services for exporters to the USA

- We develop strategies to avoid product defects, e.g. by completing quality assurance agreements in the supply chain.
- We advise companies in the preparation of a risk analysis for specific products.
- We design your contractual relationships with US sales companies.
- We advise on the establishment of US subsidiaries.
- We assist with the completion of product liability insurance policies for the USA – if necessary in the USA – and examine contracts.
- We assist in spinning off the manufacturing unit for the products that are distributed in the USA.

Contact person for exporters to the USA

Dr. Thomas Rinne

Further information can be found in the product liability guide for the USA.

Contact:

Dr. Thomas Rinne

E-Mail: rinne@buse.de | Tel: +49 69 989 7235-0

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