Product liability trends: what to watch in 2012

2012 BEGAN WITH NEWS COVERAGE OF the PIP breast implants matter, throwing up an interesting mix of issues, including regulation of medical devices, the assessment of risk, criminal proceedings abroad, what constitutes a defective product and contract issues. There is already litigation underway in some jurisdictions with perhaps more to follow. How these questions are resolved will colour the debate on other issues related to product liability over the coming months.

Against this backdrop, Sarah Croft of Shook Hardy & Bacon, highlights a number of anticipated developments in international product liability law.

EUROPEAN PROPOSALS FOR COLLECTIVE REDRESS

The debate over the European model for collective redress continues. On February 2nd 2012, the European Parliament adopted a resolution 'towards a coherent European approach to collective redress'. In the resolution, the parliament asks the Commission to demonstrate in an impact assessment that, pursuant to the principle of subsidiarity, action is needed to allow victims of infringements of EU law to be compensated through the introduction of a collective redress mechanism. The resolution makes plain that the view of parliament is that a collective redress mechanism would have the most benefit in cases where there is a cross-border dimension and where the rights allegedly infringed are granted by the EU (as opposed to simply national) legislation.

Of some comfort to in-house counsel is the reiteration that safeguards must be put in place to avoid unmeritorious claims and misuse of collective redress, as has sometimes been seen in the US. These safeguards must include that there is standing to sue – so essentially plaintiffs must be identifiable – and that any European rule should be an opt-in model, where individuals must take express affirmative steps to participate in a collective action. This is unlike the US class action rule – an opt-out rule – where individuals must state expressly if they do not wish to be included in the class action. Also, it is acknowledged that there should be a step in the proceedings at which a judge or similar body checks the admissibility of that collective action; a certification stage. This will give the opportunity for the parties to be heard on whether it is appropriate for the matter to proceed as a collective claim, another important safeguard against abuse.

UK FUNDING AND CONTINGENCY FEES

The Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO), which implements the UK government's recommendations on reducing the costs of civil litigation, is proceeding through the House of Lords Committee stage. So far, the reforms to legal aid have been the focus of most discussion and had most press coverage. Arguments also persist and amendments have been tabled around the central themes of recoverability of success fees and after-the-event (ATE) premiums and the resultant impact on costs.

Manufacturers may welcome the end of the recoverability of success fees and associated disproportionate costs claims – assuming these reforms are implemented. They may, however, view the introduction of US-style contingency fees (referred to as 'damage-based agreements') and Qualified One Way Cost Shifting (QOCS) with more trepidation. One way cost shifting describes where one party (usually the defendant) cannot recover its legal costs from the opposing party if it wins the case and so has to pay them itself. If the plaintiff wins, the defendant would have to pay the plaintiff's legal costs as well as its own, resulting in a one-sided suspension of the usual 'loser pay' rule.

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Manufacturers will have concerns about a scenario in which a claimant can fund a product liability personal injury claim on a contingency fee and be protected from the risk of paying the other side's costs if they lose.

Further regulations and rules to implement the bill are being developed by the Civil Justice Council (CJC) working group. It published a preliminary report with initial conclusions, *inter alia*, on the way QOCS would work in practice, including:

- The phrase 'claims for personal injury' should be widely interpreted for the purposes of QOCS. This was proposed by Jackson LJ, and later endorsed by the government, so that in practice, personal injury will include clinical negligence cases. The rationale for the introduction of QOCS in personal injury cases is the perception that the resources of the parties are unevenly balanced ie the defendant usually has deeper pockets than the claimant. It remains undecided whether there will be a threshold qualification for claimants based on their resources, but concern has been voiced that wealthy claimants should not be able to avail themselves of the costs protection QOCS would bring.

- While most accepted that the striking out of a claim for abuse of process should cause the loss of QOCS protection, there was debate about whether there should also be a reasonableness threshold in order to avoid defendants having to pay the legal costs of an unreasonable or frivolous claim. It may be that this issue is left to judicial discretion.

- There seems to be a consensus that QOCS should apply to, among other cases, those involving multiple defendants, multiparty claims in which the harm complained of falls within 'personal injury' as widely interpreted, and in claims in which damages for personal injury are sought alongside a non-monetary remedy.

In December 2011, the justice secretary announced that certain elements of the legal aid proposal contained in the same bill would be postponed until April 2013. It was announced at the end of January by the Ministry of Justice that the implementation of those parts of the bill covering civil costs would also be postponed. Jackson LJ always intended the measures to fit together as one package so this was no real surprise.

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UK – LIMITATION

Also expected in March or April this year is the Supreme Court decision in *Ministry of Defence v AB & ors* [2010] in which the claimants seek damages from the MOD for exposure to radiation, following nuclear tests that took place in the Pacific Ocean in the 1950s. The case is significant because the court will address two key limitation issues. First, what is the correct test for identifying the date of knowledge at which time starts running for limitation purposes? Second, how is the discretion granted to the court by s33 of the Limitation Act to be properly exercised?

US PRODUCT LIABILITY LITIGATION TRENDS

Litigation trends in the US are important for European exporters and often we see US themes translated into regulation, even if similar litigation is not filed. This can have significant ramifications for EU businesses.

Recently, US courts have been less inclined to certify mass product liability actions as class actions. Consequently, plaintiffs try to reach into manufacturers' pockets by bringing legal claims other than personal injury.

For example, having failed to hold fast-food restaurants liable for obesity-related health problems, US plaintiffs are filing class actions against food and beverage giants for economic injuries allegedly caused by deceptive product labels or misleading advertising.

There is also a growing trend in consumer fraud actions alleging that a certain food or drink, labelled and promoted as 'all natural', contains synthetic or genetically modified ingredients. While not claiming any physical harm, plaintiffs contend that they paid more for a product labelled as 'all natural' but did not receive it, thus suffering economic injury.

A recent example of such litigation is *Larsen v Nonni's Foods LLC* [2011], a nationwide class certification alleging that the defendant falsely represents its 'All Natural' biscotti products by failing to disclose that ingredients are synthetic. See also *In re: Wesson Oil Mktg & Sales Practices Litig (cooking oil)* [2011]; *Lewis v General Mills, Inc (breakfast cereal)* [2011]; and *Gengo v Frito-Lay N Am, Inc (snacks and crisps)* [2011].

US – ONGOING LEGISLATIVE AND REGULATORY DEVELOPMENTS

Introduced originally in response to product recalls involving defective goods manufactured abroad, the US Congress continues to consider whether foreign product manufacturers should be required to establish, in a state with a substantial connection to their business, a registered agent who would be authorised to accept service of process of behalf of the manufacturer for purposes of civil actions in state or federal courts or regulatory

Gengo v Frito-Lay N Am, Inc [2011] No 11-CV-10322-SVW (CD Cal)

In re: Wesson Oil Mktg & Sales Practices Litig, MDL No 2291

Larsen v Nonni's Foods LLC [2011] No 11-CV-04758-SC (ND Cal)

Lewis v General Mills, Inc [2011] No BC472451 (Cal Super Ct, Los Angeles County)

Ministry of Defence v AB & Others [2010] EWCA Civ 1317

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proceedings before state or federal agencies.

If the legislation wins passage without amendment before this Congress adjourns, it would apply to companies making drugs, medical devices, cosmetics, biological products, consumer products, chemical substances, pesticides, and component parts of these items. It would not apply to companies making tobacco or tobacco products, motor vehicles, boats, or food.

In a related development, the Consumer Product Safety Commission is refining the product safety incident reporting database www.saferproducts.gov, criticised by manufacturers for inaccurate, misleading or defamatory information, and continuing the implementation of consumer product safety laws affecting children's products containing lead or phthalates.

CONCLUSION

These are only a few of the product liability and safety matters that should be on the radar of the manufacturers and in-house counsel. It is striking that a number have a European or wider international element, in addition to some significant upcoming national case decisions and legislative changes.

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