



Product liability update

November 2017

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Strict rulings by the ASA for product advertisements alleging “health benefits”

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Johnson & Johnson ordered to pay \$417m in “talc litigation”

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Any comments or queries?

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Undercover Investigation alleges tampering with food safety records

Major supermarket chains including Tesco, Sainsbury's, Marks & Spencer, Aldi and Lidl have suspended their purchase of chicken from the 2 Sisters Food Group, the country's largest supplier of supermarket chicken, after an undercover investigation by the Guardian and ITV News revealed tampering with food safety records. [more>](#)

London Fire Brigade calls for “decisive action” to improve recalls of white goods

The London Fire Brigade (LFB) has sent an open letter to the Prime Minister asking for changes to be made in relation to the safety of white goods. The LFB is concerned about the number of people across the UK continuing to use faulty white goods, some of which are subject to corrective action or safety notices.

The LFB has stated that three fires a day in the UK involve tumble dryers, whilst one fire a day in London involves white goods. Similarly, Electrical Safety First estimates that across England, five fires a day are caused by white goods. Government data further estimates that 7% of fires caused by faulty appliances are caused by fridge freezers, fridges or freezers.

There have been a number of significant fires in recent years caused by white goods. The source of the Grenfell Tower fire in June is believed to be a fridge freezer. Similarly, there was a major fire in Shepherd’s Court last August, which was caused by a faulty tumble dryer.

In 2010, a faulty fridge freezer caused a fire at a family home, which resulted in Coroner Walker recommending measures to improve product recalls. As a result of Coroner Walker’s recommendations, an independent review of the product recall system in the UK was published in February 2016. A further list of recommendations was later published in July 2017 by the working group in response to the Shepherd’s Court fire. However, despite the creation of a Steering Group and a Working Group, the LFB contends that “no substantial changes” have occurred.

Lynn Faulds-Wood, who led the independent review, further criticised the Government for not doing enough to protect consumers.

In its letter to the Prime Minister, the LFB has called for a single register for UK product recalls, so as to allow consumers to easily check their white goods. At present, it is estimated that the success rate for electrical product recalls is only 10-20%.

The current Government webpage for product recalls has been criticised by the LFB as being difficult to manoeuvre, as there is no search option and users are directed to third party websites.

The LFB also asks for higher standards to be implemented in the manufacturing of white goods. The letter specifically requests that manufacturers cease to produce fridges and freezers with flammable plastic backing. The UK industry watchdog “Which?” has also called for change, stating that the current British standards are “deficient and inadequate”.

The LFB has also recommended that all appliances should be marked with a model or serial number so that they can be identified in a fire.

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The UK Advertising Standards Agency (ASA) has upheld a complaint made against Nomad Choice Pty Ltd in relation to a social media post advertising a “Flat Tummy Tea”. The complaint concerned the alleged “health claims” inferred from both the advert and the name of the product.

In accordance with EU Regulation No.1924/2006, health and nutrition claims made in adverts intended to promote food, supplements or drink will only be permitted if the listed health claims have been registered on the EU register.

The ASA found that the images and the text of the post resulted in an unauthorised claim which related to health, the “health benefit” being a reduction in bloating and water weight. The Instagram post published in September by TV personality, Sophie Lasaei, purported to show a “flatter tummy” as a result of drinking the tea. The post has since been removed following the ASA’s decision. The name of the product was also deemed inappropriate by the ASA for the same reasons.

The ASA has upheld various complaints in relation to health products in recent years. In August, complaints against an advert by Bio-tiful Dairy Ltd alleging that its “Kefir” drink aided digestion and immunity were upheld. The ASA held that unauthorised claims were made about the health effects of the product and therefore the advert breached the ASA’s code.

Similarly, website Cocolocks.com had to change an advert alleging increased hair growth, as this health claim was not listed on the EU register.

The ASA provides some of the strictest rules in the world regarding advertising. Its comprehensive rules are further supplemented by statutory regulation in certain areas. Just one complaint can give rise to an advert being withdrawn. For example, Channel 4 was ordered to remove an advert for Haig Whiskey which featured at 20:30 after one complaint was made about audiences under the age of 18 viewing the advert.

The rulings made in relation to “healthy allegations” could potentially impact widely across the market, given that “health and supplements” is an ever-growing industry.

Where it is merely an advert that must be changed, other than bad press associated with the complaint, the financial impact on a company may be controlled. However, where health claims can be inferred by product names, that product will likely have to be re-branded and possibly recalled depending on where products are sold. This could be very expensive.

Companies should therefore be careful in their branding and marketing so as to comply with the ASA codes of practice.

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Government publishes Automated and Electric Vehicles Bill

Following Transport Secretary Chris Grayling's announcement at the beginning of this year that legislation would be introduced to extend compulsory motor insurance to cover product liability for motorists using autonomous vehicles, the Government has now published its Automated and Electric Vehicles Bill.

The Bill, which reflects the earlier proposals, maintains a single insurer model, with one insurer covering both the driver's use of the vehicle and the autonomous vehicle technology.

In the event of an accident, an injured party shall be able to recover from the insurer of the vehicle without concern that an argument might ensue as to whether driver or technology was to blame, which could result in a delay in compensation.

When a crash is determined to have been caused by an automated vehicle the insurer will have a right of recovery against the responsible party, which could include the manufacturer of the vehicle.

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Johnson & Johnson ordered to pay \$417m in “talc litigation”

Johnson & Johnson has been ordered to pay \$417m in damages after a jury in California found in favour of the claimant, who alleged that she had developed ovarian cancer after using the company’s “Baby Powder”. The case follows a string of litigation in the US, colloquially known as the “talc litigation”.

Prior to this order, the company had lost four out of the five cases tried before juries in the US. Johnson & Johnson has subsequently incurred more than \$300m in penalties and faces thousands more claims of a similar nature. However, a number of claims have also been thrown out by the US courts.

It is alleged by the claimants that Johnson & Johnson was aware of the possible cancer risks associated with using Baby Powder, yet failed to disclose this information to the public. Specifically, claimants have sought to prove that Johnson & Johnson was aware that talc, the main product in Baby Powder, contains asbestos fibres which can cause cancer.

Unsealed documents provided by Johnson & Johnson for pre-trial depositions show tests dating from as early as 1972 where no traces of asbestos are present in any talc used by the pharmaceutical company. An undated memo written by Johnson & Johnson further states that asbestos “has never been found and it never will [be]”. However, other documents disclosed include a recommendation written in May 1974 detailing a process through which asbestos may be removed from talc.

Evidence proving the link between the use of talc and cancer is inconclusive. Mineral talc in its natural form has been found to contain asbestos fibres, as the two minerals often occur naturally near each other. However, asbestos-free talc is frequently used in cosmetics across the world and has been since the 1970s. Because of mixed evidence, the International Agency for Research on Cancer classifies talc as “possibly carcinogenic”.

The ovarian cancer charity “Ovacome” has stated that there is no definitive link between the use of talc and ovarian cancer. However, a spokesperson for the charity has said using talc products frequently on the genital area may increase the risk of cancer by a third, though “very few women who use talc will ever get ovarian cancer”.

Thus far, all actions have been brought within the US. Johnson & Johnson continues to defend the product’s safety and is appealing the most recent order made against it.

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Brompton recall 144,000 folding bikes

The British bicycle manufacturer, Brompton, has issued a voluntary recall of 144,000 folding bikes due to safety concerns with the axle.

Some riders have been left unable to pedal due to a fault with the bottom bracket, which is manufactured by the German company FAG, a division of Schaeffler.

Brompton has estimated that 1 in 5,000 bikes made between April 2014 and May 2017 have been affected. However, although the number of expected failures is higher than anticipated, there had only been one reported accident at the time of the recall.

Brompton's recall notice on its website states that the axle "still meets international safety standards [but] this does not meet the standard which Brompton sets for its components". The manufacturers pride themselves in high quality engineering.

Will Butler-Adams, the chief executive of Brompton, stated in the recall video uploaded to Brompton's website: "This is a hassle, a pain and we are really sorry about that and potentially we're going overboard but it is critical to us to protect the experience of our customers."

Brompton is offering a free replacement of the faulty part by any certified Brompton dealer. The manufacturer acknowledged that significant costs would be incurred by the recall, despite it being unlikely that 100% of customers would return the bikes to be fixed.

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Undercover Investigation alleges tampering with food safety records

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Following the allegations, the Food Standards Agency was swift to attend the Group's West Bromwich plant and has since announced its own investigation.

The Agency initially stated: "Our inspectors found no evidence of breaches. However we continue to review the evidence and if any incidences of non-compliance are found we will take prompt and proportionate action with the business concerned."

However, the Group has since suspended production at its West Bromwich plant and the Agency has extended its investigation to cover all of the Group's poultry plants, with the Agency's Chairwoman, Heather Hancock announcing: "Although our initial inspection [of the West Bromwich site] found no risk to public health, we are broadening our investigations until we are satisfied that this is truly the case."

Undercover footage obtained shows an instance of altering the slaughter date of poultry, with workers confirming that they had been asked to switch labels on other occasions. The result being that food processors could print incorrect use-by dates on supermarket packaging, something which is illegal.

Unlike "best before" dates, use-by dates are set for safety reasons.

Shadow Business Secretary, Jack Dromey, commented to the Guardian that he had been told by sacked workers in 2009 that the dating of chicken meat was changed so that meat which should have been thrown away was sold to supermarkets. Mr Dromey added that he reported these allegations to the Group.

Ranjit Singh Boparan, the head of the 2 Sisters Food Group, apologised for the scandal during a session of the Commons environment, food and rural affairs committee hearing and pledged to fund the cost of independent inspectors to police all 12 of the company's chicken sites and to improve standards at his factory, increase training of his workforce and install closed circuit television to check on staff.

The committee pledged to launch a more thorough parliamentary inquiry into food standards next year.

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