



Products update

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News

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Product recalls – the fundamentals

Product recalls are a fact of life. In recent years, there has been an increasing number of high profile recalls in the automotive, food, toy and consumer goods sectors. The number of recalls is likely to continue to rise, making it crucial that a company has a robust, thorough and effective procedure in place when it becomes aware of a problem which could potentially affect the safety of its product. [more>](#)

Product liability trends – what does 2015 and beyond hold?

The product liability landscape is changing. Set out below are some of the key emerging trends, which will impact on Insurers and businesses alike. [more>](#)

Any comments or queries?

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News

E-cigarettes – do the benefits outweigh the risks?

The debate regarding the perceived benefits of e-cigarettes smoulders on. Opinions remain divided as to whether the unknown and potentially harmful side-effects of this unregulated product outweigh the argument that e-cigarettes are a safer alternative to smoking. A recent review (the Cochrane Review) provides a cautious boost to the e-cigarettes camp.

The Cochrane Review was published on 17 December 2014. The aim of the review was to understand whether e-cigarettes help smokers stop or cut down on their smoking, and whether it is safe to use e-cigarettes to achieve this. The review considered 13 trials published up to July 2014. Two of the trials (conducted in New Zealand and Italy), with a combined sample size of 662 participants, were helpful in that they compared e-cigarettes both with and without nicotine, and also compared e-cigarettes directly to nicotine patches.

Whilst the quality of the evidence overall is considered to be low because it is based only on a small number of studies, the preliminary findings are promising. The findings reveal that e-cigarettes containing nicotine increased the chances of stopping smoking long-term compared to the use of e-cigarettes without nicotine (placebo devices). Approximately 9% of participants using e-cigarettes abstained from smoking for at least six months, compared to 4% who used the placebo device.

The use of e-cigarettes containing nicotine also helped more smokers reduce the amount they smoked by at least half (36%), compared to those using nicotine-free e-cigarettes (27%). It was not possible to determine whether e-cigarettes are more successful than a nicotine patch in helping people stop smoking, due to the small sample size.

None of the studies found that smokers who used e-cigarettes in the short-term (for two years or less) were exposed to an increased health risk compared to smokers who did not use e-cigarettes.

Notwithstanding the encouraging results of the studies, the use of e-cigarettes remains controversial. Fears remain that the use of e-cigarettes in public places will “re-normalise” smoking and reverse declining smoking rates. The impact that e-cigarettes may have on a person’s health, to include bystanders, remains unknown. The World Health Organisation has recently suggested that e-cigarettes pose a risk to bystanders through emissions of “toxicant” substances, and has also warned of limited evidence that they help people quit smoking. More recent reviews have suggested harmful effects of e-cigarettes to the lungs and immune system, as well as a potential link to cancer.

Some countries have banned the use of e-cigarettes altogether, such as Cambodia and Jordan. Others have imposed a total ban on the sale, importation and distribution of e-cigarettes, given their potential harmful effects.

Clearly, until the potential health implications associated with the use of e-cigarettes are fully established, the debate and controversy surrounding their use is unlikely to subside. E-cigarettes are not currently regulated in the UK, and will not become regulated until 2016, which heightens the uncertainty regarding the risks surrounding e-cigarette use. This will clearly impact on the insurance industry. Insurers are likely to remain cautious, and indeed reluctant, to embrace the potential opportunities that this growing market brings, until such time as there is tighter regulation and the risks become more clearly defined.

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Product recalls – the fundamentals

Product recalls are a fact of life. In recent years, there has been an increasing number of high profile recalls in the automotive, food, toy and consumer goods sectors. The number of recalls is likely to continue to rise, making it crucial that a company has a robust, thorough and effective procedure in place when it becomes aware of a problem which could potentially affect the safety of its product.

A badly handled recall could cause considerable reputational damage to a company, particularly given the media scrutiny and impact of social media. This could in turn lead to a loss of revenue and market share, and, in extreme cases, the demise of the business.

The flipside, of course, is that a well-managed and responsive recall could instil trust and confidence in consumers, thereby strengthening a company's brand. The investment in a solid product recall procedure could therefore pay dividends.

There are a number of key elements to a successful recall, including:

- have the requisite regulatory and local knowledge of the markets in which the product will be sold. A product may be regulated in one country and not another. It is therefore critical that a full knowledge and understanding of the legal and regulatory requirements is gained before production commences. This issue is likely to become more pertinent in view of the increasing globalisation of business, which is today commonly conducted across different jurisdictions and regulatory regimes
- plan ahead. To be forewarned is to be forearmed. Companies should not assume that a product is without fault. Even the most thoroughly tested product could prove to be defective, whether by design or through faulty manufacturing. A thorough policy should therefore be implemented to ensure that any issues can be anticipated early, and responded to, in a timely and discreet manner. This should include a structured system of audit and an analysis of consumer complaints and feedback
- undertake a thorough investigation. If notice of a defective product is received, it is important to establish promptly whether the defect does exist, before potentially incurring considerable expense and risking exposure to bad publicity for potentially no reason. If a defect is established, determine whether there is a problem with the product's design, or whether there is a manufacturing defect. If the problem emanates from a manufacturing defect, establish the nature and extent of the defect. Can a particular batch of goods be identified? Is the defect limited to a certain location or to a certain day or week of production?

- assuming a defect is found to exist, time is of the essence. Customers and end-users need to be identified. Maintenance of detailed records will assist in tracing customers (possibly retailers) and end-users (ie those who purchased the item from a retailer for personal use). Should a product recall be necessary, it will be crucial to contact those affected urgently. Traceability is therefore key
- a quick, cost effective and well managed system of collecting all products affected by the recall needs to be implemented, and replacement products and/or refunds administered promptly. The less inconvenience caused to the consumer, the greater the likelihood of retaining consumer confidence
- effective and sensitive management of the publicity which will ensue is critical. The press and media will require careful handling. The use of social media to keep consumers informed, and to promote a responsible and proactive approach to the recall, will pay dividends
- looking slightly beyond the product recall itself, business interruption issues will need to be addressed. It will be imperative to get back on track as soon as possible and to minimise losses and reputational damage. A recognition of any problems identified by the product recall process, and an explanation that these issues have been taken on board and dealt with, will go some way to restoring consumer confidence and loyalty
- ensure adequate insurance cover is in place, to cover, *inter alia*, recall costs, product replacement, business interruption, product liability claims and prosecution defence costs. This list is by no means exhaustive.

A general adherence to the guidelines set out above will put any company in good stead insofar as managing a product recall and its potential fall-out is concerned. A recall situation is inevitably stressful and challenging. A focused, tested and effective recall strategy will ensure that it is nonetheless dealt with successfully, thereby minimising the risk of long-term reputational and financial damage to the company.

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Product liability trends – what does 2015 and beyond hold?

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Food industry

The long-awaited report from Professor Elliott, which was commissioned in the wake of the “Horsegate scandal” was finally published on 4 September 2014. His recommendations called for the establishment of a food crime unit (to which the Government has committed), and highlighted that regulators need to take a more robust stance towards infractions, with thorough investigations, prosecutions and the imposition of heftier penalties. His report also highlighted the need for a far tougher enforcement regime, more audit and scrutiny of parties in the supply chain. With supply chains becoming increasingly complex and global, this new regime will pose challenges for Insureds and Insurers alike.

E-cigarettes

As the article elsewhere in this bulletin demonstrates, opinion remains divided as to whether the perceived benefits of e-cigarettes as a potential aid for giving up smoking outweigh their unknown and potentially harmful effects on health. E-cigarettes are not currently regulated in the UK (and will not become regulated until 2016). As such, the potential health implications and risks associated with the use of e-cigarettes are not clearly defined.

Given the uncertainties regarding the risks surrounding e-cigarette use, the insurance industry has adopted a cautious approach insofar as providing cover for risks associated with e-cigarette use is concerned. As the potential health implications of e-cigarettes become clearer, and when their use becomes regulated, it is anticipated that Insurers will more readily engage with this evolving industry.

Nanotechnology

Nanomaterials are widely used in the textiles, cosmetics, food and pharmaceutical industries, to name but a few. There is much debate surrounding the possible health and environmental effects of the use of nanomaterials, and a call for an adequate regulation regime to manage any health and environmental risks associated with their use.

With increased use of nanomaterial and/or consumer awareness, potential liability risks to manufacturers will increase also. Manufacturers will seek to minimise their exposure to such risks through appropriate risk assessment, testing of their products and ensuring that they are au fait in terms of their knowledge of the attributes and effects of nanomaterials.

Automobile sector

The UK government has committed £10m of funding for the testing of driverless cars on Britain's roads. This commenced in January 2015:

- Bristol, Greenwich, Milton Keynes and Coventry are running formal trials that will last between 18 and 36 months.

The intention is to establish the UK as the global hub for the research, development and integration of driverless vehicles and associated technologies.

The project will investigate driver behaviour of driverless cars, and will monitor how pedestrians interact with the vehicles. Risk, liability, regulatory and insurance issues will also be researched. It is hoped that the research will enable driverless cars to become a reality, and to be integrated into the existing UK transport infrastructure.

This research and advance in technology presents a significant business opportunity for insurers, although no doubt a cautious approach will be adopted given the unknown risks at present. It is certainly conceivable that product liability insurance could become more important than motor insurance in the future. Time will tell.

Globalisation of risk

Product liability exposure will become more global, as manufacturers are increasingly marketing their products internationally. Supply chains are becoming more convoluted and complex. Social media is a double edged-sword – on the one hand it is a powerful marketing tool, on the flip side it can cascade any negative comments about a product on a global scale at an alarming rate thereby fuelling an appetite for consumer litigation.

It is therefore likely that multi-jurisdictional litigation (and increasingly on a class-action scale) will escalate. Companies and insurers will need to be prepared for this, and in particular will need to become familiar with different (and increasingly stringent) regulatory regimes applicable in different countries. Whilst this does offer insurers the opportunity to expand into more global markets, such a strategy will bring with it increased liability risks for their book of business.

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- Shortlisted for Law Firm of the Year for two consecutive years
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- Winner – Law Firm of the Year – Halsbury Legal Awards 2014
- Winner – Commercial Team of the Year – The British Legal Awards 2014
- Winner – Competition Team of the Year – Legal Business Awards 2014
- Winner – Best Corporate Social Responsibility Initiative – British Insurance Awards 2014
- Highly commended – Law Firm of the Year at The Legal Business Awards 2013
- Highly commended – Law firm of the Year at the Lawyer Awards 2013
- Highly commended – Real Estate Team of the Year at the Legal Business Awards 2013

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