



## Product Safety, Liability and Recall Predictions 2020

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From China's Belt and Road Initiative to the risks of 3D printers, we offer our international experts' predictions on the opportunities and challenges that the product safety, liability and recall market may face in the coming year and beyond.

### 1. China will offer insurers opportunities and challenges

China's Belt and Road Initiative, Made in China 2025 Strategy and Foreign Investment Law 2020 have significant implications for the global insurance market. Chinese manufacturing is moving up the value-chain, with investment in high-end production of specialised goods and innovation in fields such as robotics, clean energy (including electric vehicles), new synthetic materials and emerging bio-medicine as well as rail, aerospace and maritime engineering. These industries are central to the "fourth industrial revolution" - the integration of big data, cloud computing and other new technologies into global manufacturing supply chains. Chinese insurers are leading the way in adopting automation into their own processes and in the launch of new, technology-driven solutions and insurance products (such as "First Set" cover). The global insurance industry needs to incentivise the take-up of product liability and recall insurance by Chinese manufacturers, not only as an essential facilitator of product innovation and technological advancement but also to drive improved quality standards and instil consumer confidence in "Made in China" goods.

### 2. Farm to fork traceability - is blockchain the magic ingredient?

Manufacturers, retailers and regulators are increasingly looking to blockchain technology to increase trust and traceability in global food supply chains. Tracking ingredients in real time from farm/producer through processing and global supply chains to the retailer and consumer ought to make food fraud harder and increase consumer confidence. While the technology may be secure, care will still be needed to ensure input points - from data entered by a producer to bar codes and other identifiers to track food - are not compromised. Improved traceability should also mean improved food safety and targeted remedial action - an end to blanket recalls? Time will tell if blockchain is the panacea the global food industry, regulators and consumers have been waiting for.

### 3. NDMA contamination of ranitidine medicines

Drug makers have been withdrawing various ranitidine drugs - widely used to treat heartburn and stomach ulcers - after the discovery of higher than recommended levels of NDMA, a possible carcinogen, in the medicines. The impurity was possibly introduced by changes in manufacturing processes. The recall has already triggered litigation in the US and Canada with claimant lawyers predicting an explosion of lawsuits. Concerns have been raised that litigation in the UK could follow. However, in November 2019 the US Food and Drug Administration (FDA) dismissed the health risk in a press release stating the levels of NDMA found "are similar to the levels you would expect to be exposed to if you ate common foods like grilled or smoked meats." Moreover, the FDA concluded that consuming ranitidine didn't cause NDMA to form in the stomachs of patients, as had been previously suggested. The FDA is requiring manufacturers to continue to test the drugs and in the UK the Medicines and Healthcare Products Regulatory Agency is continuing to investigate products which may be affected. Predictions of a flood of ranitidine litigation need to be treated with caution at this stage.



#### 4. Online retailers at risk of being held liable for defective goods sold by third-party traders on their platform

A US federal appeals court recently ruled that online retailers could be held liable for defective goods sold by third-party vendors via an online marketplace. The decision, under Pennsylvania law, diverged from prior judicial reasoning that an online retailer had insufficient title or control over the sale of the product to be considered a seller under product liability law. Instead, the court found on the basis of a public policy argument that an online retailer was in a position to prevent the circulation of defective products and it was in consumers' interests to be able to assert a claim directly against the online retailer. This will in turn facilitate subrogation actions by insurers, where the manufacturer is outside the jurisdiction, untraceable or insolvent. As sales of consumer goods via online marketplaces continue to increase exponentially, there will be increasing pressure on English courts to hold online retailers liable for defective products supplied on behalf of absent or insolvent third party traders - even where the online retailer is acting merely as an agent for the third party.

#### 5. The hidden health risks of 3D printers

Insurers will need to ensure that insureds involved in the manufacture or use of 3D printers are providing adequate warnings and risk assessments to make sure this technology is used as safely as possible, especially as use extends into schools and homes. Studies report links to adverse health conditions including asthma and cancer, with the printing producing high amounts of ultrafine particles and volatile organic compounds while in use (potentially for extended periods of time), which can pass through the lungs and travel to other organs and also transfer toxic material into the body. It is thought that critical to these levels is the formulation of the filament (for example additives to increase shine) and the temperature to which it is heated. This continues the trend requiring increased awareness around the health risks of emerging technologies.

#### 6. A US Perspective: Autonomous consumer products will alter a major sector of the product liability landscape

Autonomous consumer home electronics will identify hazards, pre-empt malfunctions, capture data and communicate with end-users in real time. This has huge potential to reduce the volume of property damage related insurance claims, but at the same time gives rise to new exposures in the shape of product liability claims, cyber attacks and data breaches. Liability assessments and relationships with component suppliers and big box retailers will become more complicated and the market for traditional product liability insurance coverage will be disrupted.

#### 7. Microplastics will lead to a range of insurance exposures and the issues will be complex

The prevalence of microplastics puts the risks they create at a systemic level. They include environmental risks, such as marine pollution, which will lead to environmental, loss of income, liability and product liability claims. There are also the risks to human and animal health, which will lead to personal injury claims, workers compensation claims (particularly for workers processing nylon flock, plastic fibres and synthetic textile) and product liability claims. Microplastics create some similar risks to silica dust because the tiny particles can be airborne and easily inhaled. However, unlike silica dust, microplastics are a group of substances identified generically, rather than individually. This will lead to issues of causation and liability, as well as highly contested expert evidence regarding economic loss.



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### 8. Lithium-ion battery technology will keep driving efficiencies, but the risks must be better managed

Lithium-ion batteries will continue to be embraced as efficient and cost-effective ways to store energy as a power source. However, while the new technology is transforming many industries it is not without risk. Lithium battery failure and overheating results in a process called “thermal runaway”, which can produce enough heat to cause adjacent batteries to explode. An enormous issue is that these fires require specific training, planning, storage and extinguishing interventions as water makes the fire worse. The challenge requires government agencies to better define safety standards and for manufacturers to rigorously test their products. If not, product recalls, liability and property claims will follow. Safety issues must also be addressed at the recycling phase, given the short life of the batteries.

### 9. Drones - an increasing risk

Drones have made their way into every-day life and their number will rise as soon as ways of using them commercially (especially in transport to end customers) become common. There is a multitude of legal aspects to be covered, from shared use of the skies to liability questions in respect of crashes, accidents and hacking/use of malware. Insurers have begun to identify drones as an increasing risk and addressed their use in private liability insurance. Risks will become larger as drone use for the distribution of goods matures, and insurers will have to re-define exclusions in general commercial liability insurance. Recovery actions will also increase where there are software or technical flaws.

### 10. A German Perspective: E-Cigarettes

E-Cigarettes or “vape pens” have become a hot topic since the outbreak of lung injuries took its first casualties in the US. That has not gone by unnoticed in Europe, and dangers of vaping e-cigarettes are publicly discussed. While the inclusion of harmful ingredients in vaping aerosols are regulated in Germany, the risk from goods imported into Europe from abroad (legally or not) exists. Putting aside the obvious liability aspects (which are to some extent similar to claims against the tobacco industry some years ago), this could have an impact on the approach to the licensing and labelling of new potentially harmful technology.

### 11. A German Perspective: Sugar is the new fat

Fat was identified to be the most harmful nutritive substance twenty years ago, and the food industry engaged in large campaigns advertising low-fat products. It is now generally accepted that sugar and sugar-related ingredients are a more relevant factor to food-based diseases or deaths than fat ever was. Litigation against manufacturers of sweets has once failed in Germany due to the doctrine of self-induced risks, but hurdles will be much lower where product ingredients (and their quantities and potential harmful effects) are not clearly advertised.



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