



Product Safety, Liability and Recall Predictions 2022

For further information or enquiries, please contact:

Wendy Hopkins

Partner

whopkins@dacbeachcroft.com

+44 (0) 207 894 6863

Jose Maria Alvarez-Cienfuegos

Partner

jm cienfuegos@dacbeachcroft.com

T: +34 91 781 6300

1. As new liability risks emerge, is unintended “coverage creep” inevitable?

The information age has allowed rapid global communications and networking to re-shape modern society. Loss of control over global supply matrices, the interaction between tangible products and digital services, and the environmental impact of global manufacturing give rise to new liability exposures for insurers. At the same time, the inability of regulation to keep abreast of such developments, coupled with heightened social expectation, is leading to more litigation and claims inflation. It is increasingly the case that companies are incurring liabilities they had not envisaged and liability insurers are being called upon to respond to losses which were not anticipated by underwriters or reflected in the premium. Learning lessons from silent cyber and the COVID-19 pandemic, general liability underwriters need to move towards more explicit affirmative coverage for catastrophic risks, or to tighten up contract wordings so that they clearly articulate underwriting intent. This should focus on clarifying insuring agreement clauses and definitions as much as policy exclusions. At the same time as achieving contract certainty, liability insurers need to develop new ways of assessing and managing risk if they are to deliver the claims certainty that global corporate policyholders are seeking in these unpredictable times.

2. AI, updates, law outdated?

Our current legislation is unfit for the digital age. With smart products being less tangible, reliant on digital content and artificial intelligence (AI), are product laws keeping up? The UK Product Safety Review is underway. The Consumer Rights Act has addressed the quality of digital content since 2015. But fundamental legal obligations about safety and quality still sit more easily with traditional tangible products. Expect the debate to move to whether tech products, reliant on software updates and algorithms, are more like services, currently unregulated in product safety terms. New legislation is required to address who consumers can look to for redress in the digital age. Where consumers are effectively buying experiences more than tangible products, where AI enables products to self-learn and consumers can produce 3D printed products, the law will still need to ensure safety and predictability for consumers and businesses alike.

3. You may have heard of green-washing but watch out for ESG-washing and social-washing

As the pressure builds on companies to monitor the working practices of their supply chains and disclose their ESG-related financial investment, the burden is on all businesses to be seen to be complying with their ESG obligations. As we have seen with the “Dieselgate” litigation, failure of manufacturers to comply with emissions regulations - or the greenwashing of credentials or their products to mislead consumers - can have dire legal and reputational consequences. An issue for insurers is whether this might trigger unforeseen liability risks, whether in the form of product liability, advertising liability or D&O exposures in the face of shareholder recoupment claims. Underwriters should seek evidence, pre-inception, that their corporate policyholders are issuing consistent and accurate statements regarding compliance with their climate, sustainability and ESG responsibilities in order to mitigate exposures and the reputational damage of being associated with companies that stray into “washing” their practices.



4. Supply chain due diligence poses major challenge for liability insurers

With the imminent arrival of the EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence, larger companies operating in the EU will be expected to ensure that their business partners throughout the value chain put in place governance policies in line with the company's due diligence strategy. As ESG-related issues continue to gather momentum globally, this trend is already in motion in many industries, such as the fashion industry where sustainable fashion and the environmental impact of sourcing materials is under the spotlight. While such legislation is to be welcomed in seeking to manage such emerging areas of risk, it could equally give rise to new criminal or civil liabilities on companies and their directors which may be inadvertently covered under general liability or D&O policy wordings. A major challenge that liability insurers face is assessing whether their corporate policyholders have the necessary control and visibility over their suppliers. Underwriters would be well-advised to prioritise supply chain due diligence as part of their risk assessment strategy.

5. England may become the first country to prescribe e-cigarettes

England could become the first country in the world to prescribe e-cigarettes licensed as a medical product. The Medicines and Healthcare Products Regulatory Agency has updated its guidance, paving the way for medically licensed e-cigarettes and other inhaled nicotine-containing products to be made available for prescription on the NHS for patients who want to quit or reduce smoking tobacco. To be licensed, the products would need to meet the standards of quality, safety, and efficacy expected of medicinal products. In addition, where the e-cigarette is refillable and re-useable, it will also need to meet the UK Medical Devices Regulations 2002 (as amended). E-cigarettes were the most popular aid used by smokers trying to quit their habit in England in 2020. Even so, the move to regulate e-cigarettes as medicines is not without controversy as many countries around the world have now banned or severely restricted the sale of e-cigarettes due to concerns about their health effects.

6. COVID-19 vaccination programme remains key defence in fight against pandemic

On 8 December 2020, the UK became the first country to roll out a COVID-19 vaccination programme. Vaccines give high levels of protection. Deaths and hospital admissions due to severe illness have greatly reduced. The question now is how immunity lessens over time, particularly for older adults and at-risk groups, with the booster programme designed to bolster waning immunity. All of this has been thanks to the work undertaken by vaccine scientists and the availability of funding, with nearly 1.5 billion doses now being manufactured each month. The World Health Organisation's target is to vaccinate 70% of the world's population by mid-2022. While regulators have sought to ensure safety, efficacy and quality in challenging circumstances, we can nevertheless expect liability claims to arise against producers and healthcare providers arising from issues such as availability, side effects, dosage and timing of immunisation.

7. Glyphosates - group litigation on the European stage?

In 2015, the International Agency for Research on Cancer, an arm of the World Health Organisation, found that glyphosate was "probably carcinogenic in humans." Bayer, the manufacturer of RoundUp (the most well-known glyphosate-based herbicide), has since been hit with 3 US judgments by claimants alleging that it caused them to develop non-Hodgkin's lymphoma and has paid \$10bn to settle a class action involving more than 100,000 claimants. Class actions are also afoot in Canada and Australia. Bayer nevertheless continues to assert that RoundUp is safe, having been approved by regulators and relied upon for agricultural and domestic use worldwide. Glyphosate is currently approved in the EU until 15 December 2022, when further analysis on the causative link and minimum dose requirement is expected, although Austria, Luxembourg, Germany and France have already banned or restricted its use. Whilst group litigation in Europe is less likely, particularly in civil jurisdictions where disclosure obligations, access to litigation funding and punitive damages are more restricted, the new Directive on Representative Actions for the Protection of the Collective Interests of Consumers and social inflation factors may prove us wrong.



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8. Storage risks loom large as global demands rise

A key issue in global supply chains is the suitable storage of goods, including cold storage solutions and storage options for delicate or dangerous components. The expected increase in demand for cold chain solutions, fuelled by a rise in demand for quality groceries from around the world and multiple delivery channels, may put pressure on these options and lead to product spoilage, injury claims and product recalls. This could be exacerbated by the post-pandemic supply chain strains with significant delays in shipping time-sensitive products.

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9. Product liability fallout from the pandemic in Australia

There has been a concerning number of businesses taking advantage of the COVID-19 outbreak. In Australia, the regulator has received many complaints about a wide range of fake, unauthorised and unlicensed products. In December 2020, it took high profile action against Lorna Jane Pty Ltd (Lorna Jane) regarding its LJ Shield Activewear, which was promoted to protect wearers from COVID-19. In July 2021, the Federal Court ordered Lorna Jane to pay Au\$5 million in penalties and the ACCC's costs for making false and misleading representations to consumers and engaging in conduct liable to mislead the public. It is likely the regulator will actively pursue any similar transgressions.

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10. Hand sanitiser could drive injury claims and product recalls in Australia

The COVID-19 pandemic led to a global shortage in alcohol-based hand rubs so Australia relaxed legislation to make it easier for local businesses to rapidly produce it. This led to increased imports of methylated spirits containing methanol. There is now growing concern around the health effects of methanol, which has led to a proposed amendment to the Poisons Standard to include hand sanitisers containing more than 2% methanol. This may lead to a rise in sanitiser-related injury claims and product recalls.

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11. Commercial supply exposed to consumer claims in Australia

Increasing numbers of commercial supply transactions are likely to be subject to consumer guarantees under the Australian Consumer Law (ACL), following the July 2021 increase to the threshold for the value of goods from Au\$40,000 to Au\$100,000. We expect this will increase the volume and value of product liability claims brought under the ACL.

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