ROUNDTABLE

Product Liability

EXECUTIVE SUMMARY

Recent consumer product recalls—including tainted pet foods and faulty baby cribs—have dominated the news. The global economy, which has led to increased overseas manufacturing and international competition, has contributed to the recent wave of recalls and impacted the issues that product liability practitioners face. The same trends have affected the practice of insurance recovery specialists representing product liability defendants.

Our panel of experts from Northern and Southern California discusses these issues, as well as the effects of the Class Action Fairness Act (CAFA) of 2005 and California's Proposition 64 on product liability class actions. They are Gail Lees of Gibson, Dunn & Crutcher; Anna McLean and Marty Myers of Heller Ehrman; Pamela Yates of Kaye Scholer; Robert Nelson of Lieff Cabraser Heimann & Bernstein; and Jim Huston of Morrison & Foerster. The roundtable was moderated by freelance writer Bernice Yeung and reported for Barkley Court Reporters by Cherree Gage.

MODERATOR: How has the global economy affected your product liability practice?

HUSTON: For a while now, companies from around the world have been transferring a lot of manufacturing overseas. Now we're seeing some of the implications of it, particularly to Asia, given the increased sophistication of manufacturing capabilities there. At the same time, there's also been a somewhat cavalier attitude by a few Asian manufacturers in meeting appropriate quality standards and complying with U.S. laws. A great number of American companies have relied on overseas manufacturers with varying degree of supervision. It's difficult to supervise daily operations in central China, for example, in order to make sure that the manufacturers are complying with the appropriate regulations and quality-assurance procedures. So we're seeing some products coming to the U.S. that are failing. And they're failing not only to perform, which are what class action warranty cases are about, but they're also injuring people. Ultimately, we're seeing some of the implications of physical distance between the U.S. companies and their manufacturing facilities overseas.

LEES: Foreign manufacturing cases can certainly be complicated for defendants to deal with. In the pet food cases, for example, the name-brand manufacturers would say that they were victimized by a practice that occurred overseas, and which they had no reason to believe was going on. But at the same time, defendants have a desire to reassure customers that they're taking the right steps to remedy the situation and so there's the quick issuance of a recall and apologies, which is ultimately inconsistent with a vigorous defense at trial. So it's important and yet difficult to craft a media strategy that works with a litigation strategy. In the pet food cases that I've been involved in, the brand-name manufacturers have been providing compensation to customers with claims totally apart from any litigation.

YATES: Our product liability practice has had an international base for quite some time, but I think we're all probably seeing an expansion of it as this global economy continues to grow and outsourcing continues. From a pharmaceutical perspective, I think one of the problems we have in representing a U.S. company results from the differing regulatory standards found in various countries. Product warnings are different in the European Union (EU) than in the United States, and if they're better in the EU than the United States, you have to be ready to explain to your client that this could hurt them at trial because American jurors like to believe that the standards in the United States are more comprehensive than in other countries. And when jurors hear that the same product in a foreign country carries a better warning, jurors can hold that against your client, even if the company complied with U.S. regulatory standards. So I think this rise in the global economy leads to a need by all of us to recognize that defending product liability cases is evolving into a more global defense—we have to be aware that actions in one country can have an effect on our defense here in the U.S.

NELSON: From a plaintiff's perspective, I see it a bit differently. While I agree that U.S. product manufacturers have increased risks as a result of their associations with factories across the globe, my office is getting more calls from foreign consumers who are looking for representation as a result of the conduct of strictly American manufacturers or pharmaceutical companies. So in my efforts to represent foreign consumers, I'm struggling with issues such as forum non conveniens and where is the most appropriate forum to sue American manufacturers on behalf of foreign consumers. To me, the global economy means foreign consumers are increasingly looking to United States lawyers for assistance.

However, our courts have not shown much openness to these claims.

McLEAN: In my practice, I'm noticing that more foreign governments are considering adopting American-style class action reforms. We were recently visited by a delegation from Japan, which has just passed a quasi-class action law. So in the future, there may be remedies for foreign consumers in their own countries.

On the other hand, foreign lawyers often express surprise at the incentives, such as contingency fees, that exist within the American justice system with respect to class action litigation. The Japanese delegation was surprised to learn that plaintiffs attorneys get paid out of whatever they recover, and that they use those recoveries to fund future litigation. In Japan, class actions can only currently be brought by consumer groups, which have limited public funding. Until this lack of incentives changes, there will still likely be foreign consumers coming to the U.S. to take advantage of our judicial system.

MYERS: From the perspective of a defendant's insurance recovery for a product liability problem, globalization has been a positive and a negative. It's been a positive because, increasingly, we're finding some foreign parent companies—especially European-based parents of major U.S. subsidiaries—have broader insurance coverage that may apply to the U.S. subsidiaries. This is also true for a few countries in Asia, particularly Japan. The downside of recovering for those alleged injuries in a global economy is that business insurance markets in much of Asia, particularly in China where some recent product liability issues have originated, are not as highly developed as those in Europe and the United States. So throughout the supply chain, when turning to business partners as a source of insurance and recovery for these liabilities, one sometimes comes up empty-handed.

HUSTON: And yet foreign plaintiffs are not universally without remedies. I'm handling several cases in Greece right now that would normally have been filed in the United States. But those plaintiffs chose, even with a possibility of jurisdiction here, to pursue wrongful death cases in Greece because the damages are not that different, and other factors such as the burden of proof are in their favor.

NELSON: That's an important observation. In our international practice, we always analyze local laws when we're trying to determine where to sue. So, for example, in Greece, where we also have represented plaintiffs, we have learned that Greek law allows for more relatives, such as aunts and uncles who do not have standing to sue in the U.S, in a wrongful death action.

YATES: It seems to me that as the world opens up, it's important for us to recognize our role in advising international clients of the U.S. system, so that they're not shocked when they come here and find different laws on contingency fees and causes of action. It's up to us to become a little more well versed in what foreign clients usually face in their own country.

And then there are the issues that come up with a foreign manufacturer—and obviously we have seen a lot of these problems in conjunction with the recent product recalls. The American system is based on the idea that somebody's on the hook somewhere along the chain of commerce. But the question is, does the ultimate responsibility lie with someone who you can actually get that hook into? And even though a foreign manufacturer that sells a product in the United States is obviously subject to being sued here if the product causes harm, enforceability of the judgment is another issue. As a result, there could certainly be a shift in that chain of responsibility; as plaintiffs know somebody at some point in that chain will pay if a product caused harm in the United States.

MODERATOR: What has prompted the recent wave of product recalls? What issues or problems are raised by these recall cases?

MYERS: There's significant pressure to get products, including technology products, to market very quickly, and I suspect this unrelenting competitive pressure may play a significant role in what we're seeing on the product-recall front.

YATES: That's a good point. I just did a presentation for the Association of Corporate Counsel where I told the attendees that jurors understand that this is a competitive business environment, and corporations need to be profitable. Jurors understand this and they accept it if corporations do the right thing. And the right thing means that at every step along the way, the corporation is

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evaluating the safety of that product. My motto is: Stop, think: safety. The consequences and expenses of a recall is huge, whether it is in the court of public opinion or otherwise.

But what has prompted the recent wave in recalls? Again, it does have something to do with outsourcing, to some degree. How can you maintain your quality-control procedures when one of your suppliers or manufacturers down the line is outsourcing? So, to the extent that they can, companies need to continue to monitor and control for quality.

HUSTON: I agree. To some extent this recall trend illustrates the need for any company bringing a product into the United States to have a vigorous quality-assurance program. If you're an international corporation, it's incredibly difficult to maintain quality on a global level. Part of the reason we're seeing problems such as the use of lead paint on toys and the manufacturing of tainted food is because of the competition *among* manufacturers and even provinces in China to get manufacturing business. The more you drive down prices without direct supervision of the process, the more risk a corporation is going to assume. So it remains crucial that companies maintain global quality control. Companies may need to start testing their own products before they bring them into the U.S., and not just trust that manufacturers have complied with quality specifications.

LEES: Where the U.S. government doesn't have the ability to regulate a foreign manufacturer, it may still try to regulate the downstream members of the supply chain that are based in the U.S. And we may see the kinds of agreements that people are making to resolve litigation and to satisfy the concerns of government agencies, such as the FDA, become industry standards. As the standards evolve, they likely will become a natural part of the way people do business overseas.

McLEAN: I think it will go beyond just standards and into actual enforcement. All of the companies involved in these recalls would say that they had standards in place, and that they relied on their suppliers to meet them. But clearly that's not enough, and there will have to be some actual enforcement by American companies operating in a foreign manufacturing environment.

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MYERS: The most important thing that a company can do once it has identified the need for a recall and cooperated with governmental entities is to figure out what its insurance coverage looks like—and it is critical to do this before structuring a deal with distributors, vendors, other manufacturers in the supply chain, and/or consumers. Hundreds of millions of dollars of insurance can ride on decisions made—or not made—at the very outset.

NELSON: Marty [Myers], you initially talked about the pressure to get products to market, and I think it's a very real factor for many companies. But where manufacturers are also weak, in my judgment, is in the post-marketing arena, and, specifically, how rigorous is the oversight of adverse events once the product is actually available on the market. It's our experience that pharmaceutical companies simply are not following up adequately when problematic information regarding morbidity and mortality in the field becomes known to them.

YATES: Certainly, pharmaceutical post-marketing is a hot topic. The reality is that nowadays, you have medications that treat more and more serious illnesses, so the likelihood of adverse effects goes up. I have found that jurors can be more accepting of the existence of greater side effects, given the greater ailments that these pharmaceuticals are treating.

MYERS: It's also important to note that typical general liability insurance that applies to bodily

injury in pharmaceutical cases, or property damage in many products cases, will have some form of recall exclusion. However, that clause ordinarily only applies to a recall of the company's own product. For example, if your product was incorporated into another company's product and that company's product is recalled from market, every dollar spent by your downstream customer, and your liabilities to that customer, and to end users, may be fully payable out of your own general liability. The same is true for much of the cost of disposing of the product and conducting the recall.

There is also specialized product-recall coverage available on the market. Many companies I work with carry it. And I can tell you that there has been a wave of increased interest in the last year from clients looking for consultation on the topic. As the economy globalizes, we're finding nooks and crannies of coverage in the Netherlands, and in various other places, which end up often unexpectedly applying to U.S. operations of multinational companies. The choice-of-law issues applicable to these insurance issues is fascinating and can be mind- boggling.

NELSON: I'd also like to suggest how important, from the plaintiffs perspective, it is to understand the various relationships among the insurance carriers and their insureds, in order to adequately represent their plaintiffs. For example, it is not uncommon—and oftentimes, it can be an absolute necessity—for me to retain someone like Marty [Myers] to help me analyze the insurance issues to put maximum leverage on the carriers. So sometimes plaintiffs firms and traditional defense firms that have insurance practices join hands in this effort.

MODERATOR: How has legislation such as the Class Action Fairness Act and California's Proposition 64 affected product liability class actions?

McLEAN: The Class Action Fairness Act (CAFA) has completely changed my practice. For years, I was exclusively in state court, and now I'm almost exclusively in federal court. Because you only need one diverse party and $5 million at stake to have federal jurisdiction under CAFA, virtually all class action cases are now handled in federal court, either by removal or because more plaintiffs are filing their cases there.

Ultimately, I think CAFA has had the effect that was intended by the legislation in that it has curbed the filing of nationwide class actions in state courts in somewhat obscure locations as a means of getting a substantial settlement. It's also eliminated another problem that we used to deal with—where multiple, overlapping cases were filed in different states, and plaintiffs lawyers raced to trial in those various jurisdictions. You still have the possibility of a multidistrict litigation (MDL) proceeding, but I haven't found that it's been used much. I think that the plaintiffs attorneys are typically not engaging in the kinds of multijurisdictional battles that used to occur.

LEES: As a result of CAFA, I think corporate defendants need to look before they leap into federal court because it is not the panacea for defense interests that it's conventionally thought to be. For example, federal judges, at least in the Central District of California, are so overburdened that many of them do not hold hearings, even on very major motions such as class certification.

My point is that a defendant shouldn't remove a case as a knee-jerk response. There are some very good complex court programs—in Los Angeles, San Francisco, Orange County, and many other places in the state—where high-quality judges have much smaller dockets. It can mean that you get judicial supervision and a level of attention that makes it easier to deal with issues that might affect your ability to defend the case.

NELSON: My view is that CAFA has unnecessarily taken class cases away from our very capable California judges, and I see no benefit to that at all. I've also found that cases take much longer in federal court. I'm not sure if that was an intended consequence of CAFA, but it certainly has slowed down our class cases, and that is another negative that I associate with CAFA.

McLEAN: I'm somewhat surprised to hear that CAFA has slowed down your class cases because here in the Northern District and the other jurisdictions where I've had cases over the past few years, I have found that the federal courts are now moving faster than the state courts. In addition, I have also found that federal courts are more willing to grant motions to dismiss, which of course ends the case very quickly. I guess it varies by jurisdiction.

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HUSTON: I think that we are a little spoiled in California because we have some really, really fine state court judges. We have to keep in mind that this law applies in other places where they're much less inclined to stay in state court. But a couple of trends I've noticed is that not everybody is removing every class case to federal court all of the time.

We have also found it a little more difficult to settle cases in federal court. Settlements seem to take longer and they're harder to get approved. The other thing I've noticed recently is the filing of class actions where the only relief sought is injunctive in nature. Plaintiffs are essentially saying that the case doesn't meet the $5 million amount-in-controversy requirement, so they prefer to stay in state court so they can collect attorneys fees. That would never have happened in the past.

LEES: Another disadvantage with CAFA's application can arise if the case is one the client might want to settle. If the case might be amendable to settlement with some type of coupon-type approach, CAFA—which requires greater scrutiny of coupon settlements—is going to create substantial impediments. Having said that, we're also seeing state judges starting to look very closely at coupon settlements. So it's not necessarily the case that you'll be able to get approval of a coupon settlement in state court, but not in federal court.

MYERS: Structuring these settlements will impact coverage. The increased scrutiny of coupon settlements in state court has been another general benefit to insureds because of the types of relief which tend to be agreed upon during the settlement—cash benefits and a specific component for plaintiffs attorneys fees and costs tend to fit more snugly into insured rather than uninsured buckets. So part of the impact of the increased scrutiny of coupon settlements as a result of CAFA and Proposition 64 has been to enhance insurance recoveries for product liability settlements.

YATES: Proposition 64 has actually had more of an impact on my practice. We used to see an incredible number of 17200 violation cases; every time a pharmaceutical client was sued over personal injuries, along came a 17200 lawsuit. Recent examples from our office include *Rezulin* and *PPA* (both dismissed), as well as the *Listerine* 17200 action currently pending before the California Supreme Court. Using the authority of the private attorney general, some firms popped up out of nowhere to sue. Prop 64 has shut them down to a great extent.

McLEAN: I still see 17200 cases, but they're usually combined with other claims. In addition, there are a number of unresolved issues with Prop 64, including the reliance issue, which arises from the requirement that the injury be "a result of" a fraudulent business practice or false advertising. The issue of whether Prop 64 imposed a reliance requirement is now before the California Supreme Court. And I think, depending on how the issue is resolved, you may see a revival of cases or a continued lull.

In my practice I've seen some change, but not a huge amount. Cases are still being brought by plaintiffs who have standing, but there's a greater attempt to link the particular alleged advertising misrepresentation or harm with the plaintiff and with the class. So I don't see Prop 64 creating an insurmountable barrier to consumers who want to pursue these kinds of cases, although it has certainly helped prevent the kind of frivolous cases that the legislation aimed to eliminate.

NELSON: Even prior to Prop 64, whenever our firm handled an Unfair Competition Law (UCL) claim, the case was always based on someone who had suffered some form of harm. In fact, some plaintiffs firms did not object all that strongly to Prop 64 because it was expressly limited to standing. Some even agreed, despite the unique nature of the UCL, that it was not inappropriate to require that a plaintiff have suffered harm in order to sue.

But certainly we did not anticipate that Prop 64 would somehow cause a change in the other requisites of a UCL claim. I'm actually very troubled by this actual reliance argument that defendants are making, and which the Supreme Court will soon decide. Prop 64 had a very limited, expressed purpose and it seems to me that the idea that Prop 64 says anything at all about reliance is overreaching and in any event overstating what the legislation was designed to do.

LEES: I disagree. Reliance is an integral element of the requirement that a plaintiff suffer an injury in fact or an injury to the plaintiff's property, or the requirement that a plaintiff lost money because of the conduct of the defendant. But I guess the Supreme Court will tell us what it thinks.

"To me, the global economy means foreign consumers are increasingly looking to United States lawyers for assistance."

MYERS: Another fascinating outgrowth of Prop 64 is that it's defied the conventional wisdom that there's no coverage for 17200 cases. Sure, the California Supreme Court has said that a claim solely for purely restitutionary relief is not insurable, but plaintiffs lawyers have been clever at including additional claims that are insurable, particularly under the California Legal Remedies Act (CLRA), as well as claims based on advertising, which have been a frequent trigger under errors and omissions insurance policies. In California, as in many other jurisdictions, because even one potentially covered allegation means the insurer must pay defense for the entire case, the inclusion of additional legal claims has led to some interesting results for our clients vis-à-vis their insurers. ■

"Rountable: Product Liablity" originally published in the December, 2007 issue of *California Lawyer*.
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