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The Growth of U.K./U.S. Cross-Border Litigation

By Paul Llewellyn and Colleen Davies

It is trite to observe that we live in a globalized world; the banality of the observation, however, confirms its validity. Practitioners working in the product liability field have been grappling with cross-border issues for many years. Now the issues have become more complicated with the concentration of production in fewer companies, the increased global reach of major manufacturers, and the growing harmonized regulatory framework in Europe.

These complexities are highlighted by the continuing allure to E.U. citizens of the American system of compensation and the increase in the occurrence of quasi-class actions in Europe.

Why Foreign Claimants Sue in the United States

It has been said that foreign claimants seeking redress in the United States are like moths drawn to light. The attractions of the U.S. forum are obvious enough:

- access to liability theories that are entirely unknown in the U.K., such as medical monitoring;
- damages greatly in excess of anything that could be achieved in any European jurisdiction;
- the sympathy of a jury rather than the forensic deconstruction of the evidence and law required of the judges who oversee tort litigation in the U.K.;
- discovery rules that are highly effective at inducing settlement simply by weight of the burdens and costs they impose; and
- litigation that is without risk for a claimant under contingency fee arrangements, as compared with the invariable "loser pays" rule in Europe, by which the loser is liable for the winner's attorneys' fees.

In addition to the incentives that U.S. courts provide U.K. claimants, U.K. claimants also face difficulties funding their own substantial product liability claims at home, particularly in cases involving a significant volume of documents and complex issues of liability and causation.

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To begin with, U.K. claimants may not be able to afford their own counsel. Legal aid—government funds which offset claimants' court-cost and attorney-fee expenses in approved cases—generally are not available for pharmaceutical and other product liability claims. Claimants' lawyers also often are reluctant to undertake such high-cost cases under conditional fee arrangements ("CFA"), whereby the claimant does not owe his or her own attorney if the claim fails, but defendant pays an uplift in fees if it succeeds.

Moreover, even when a U.K. claimant can secure an attorney willing to represent him or her under a CFA, the loser-pays rule means that claimants still bear a significant risk that they will owe the defendant for its costs if the claim fails. In some circumstances, this risk can be mitigated by "after-the-event" insurance to pay the defendant's costs, but this insurance can be difficult to obtain at reasonable cost and sometimes is not available at all.

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A New, Concerted Effort to Litigate in the United States by U.K. Claimants?

Despite all the attractions presented by U.S. courts, foreign claimants face significant difficulties filing in the United States, particularly in overcoming applications to oust jurisdiction on *forum non conveniens* grounds. Nevertheless, in recent years, U.K. and other E.U. claimants have filed U.S. class actions against a variety of product manufacturers, including those in the automobile, pharmaceutical and medical device industries—and absent a clear and consistent rejection of such claims by U.S. courts, the filings are likely to continue.

Plaintiff Referral Networks. U.S. plaintiffs' counsel have been adept at cultivating strong professional relationships. This is best reflected in the cooperation found between plaintiffs' law firms in U.S. mass tort lawsuits (*i.e.*, through various claimant steering committees) and within professional attorney organizations. These relationships provide the foundation for the exchange of information on specific manufacturers—including information about a particular product's development and marketing history, product complaint trends and recall activity—as well as litigation strategies. In recent years, U.K. claimants' firms have increasingly partnered with U.S. plaintiffs' firms. In some instances, this cooperation is limited to information sharing. But in several instances, this has led to the firms serving as co-counsel in cases filed in the United States by U.K. plaintiffs.

Forum Non Conveniens. A motion to dismiss because of inconvenient forum often serves as the first line of defense when a foreign plaintiff files suit in the United States, and many courts remain amenable to the idea that foreign residents who claim they were injured by a product and treated overseas should not be filing in the United States, even if the product was manufactured by a U.S. company. Such motions, however, usually require U.S. courts to apply a factorial analysis, but leave them considerable discretion to retain cases in the United States. *See*, *e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (detailing federal *forum non conveniens* test and courts' discretion in applying it). Even if U.S. courts only occasionally exercise their discretion to keep a foreign plaintiff's claim in the United States, even a small chance of proceeding in the United States may

present ample encouragement to foreign claimants, given that the financial advantage can be so substantial.

U.K. claimants' lawyers may well be willing to push *forum non conveniens* considerations in an effort to gain more widespread acceptance of foreign plaintiffs in U.S. courts as well. For example, one threshold issue in a *forum non conveniens* analysis is whether the plaintiff who wishes to sue in the United States has an adequate forum elsewhere, and an alternative forum is "adequate" even if its laws are less favorable or lessen a plaintiff's chances for recovery. *See id.* at 249–51, 254–55 n.22. An alternative forum is inadequate only when it is "clearly unsatisfactory," such as when it "does not permit litigation of the subject matter of the dispute" or offers virtually no remedy at all *Id*. at 254–55 and n.22.

Historically, it has been easy to establish this in respect of the U.K. and virtually every other Western democracy. However, one leading U.K. claimants' lawyer has said that his strategy in such cases will be to test the point by arguing that the difficulties U.K. plaintiffs may face in funding product liability lawsuits means that justice cannot be obtained, rendering the U.K. an inadequate forum.

U.S. Lawyers in the E.U.

The transatlantic traffic is not all one way. New forms of collective procedure, some very similar to U.S. class actions, have been introduced in a number of E.U. countries such as Spain, Sweden and the Netherlands. Ironically, just as President Bush signed the Class Actions Fairness Act in January 2005 to reign in U.S. class action practice, President Chirac of France was advocating the introduction of U.S.-style class actions in France.

A number of practical constraints will prevent the new E.U. collective procedures from producing the recognized excesses of U.S. class actions: the absence of juries, contingency fees, punitive damages and the existence of the "loser pays" rules. It cannot be assumed, however, that these constraints will not be removed or at least undermined over time. The belief of leading U.S. class action claimant lawyers that Europe will become a fertile litigation culture was highlighted by an interview in *The Lawyer* on 24 October 2005 with Michael Hausfeld. Stated to be the head of a unique international network of likeminded claimant lawyers, he described his task as "a crusade to export America's legal system around the world."

International Discovery Coordination

Building upon these relationships and legislative trends, claimants' counsel also share and coordinate discovery between countries. For example, by having U.K. claimants' counsel associate in U.S. litigation, they become signatories to protective orders and thereby gain access to a product manufacturer's discovery documents or witness depositions. Similarly, the joint retention of experts permits cross-border development of claimant liability themes, particularly on causation and damage theories.

Claimants' counsel can also coordinate to expose differences in how a product manufacturer handled a product and the development, manufacturing or marketing stage of a product cycle. For example, in U.S. mass tort litigation, claimant lawyers will often focus on product warnings that took place in the U.K. or another foreign venue—but not in the United States. This alternative focus can become the cornerstone of liability or punitive damage theory with assertions that injuries could have been avoided in the United States had the manufacturer followed foreign labeling practices.

Electronic Discovery

Claimants' counsel in the United States now routinely serve broad-based discovery demands requiring electronic data mining and production in jurisdictions outside the United States. Such discovery is enormously expensive and burdensome to U.S. manufacturers, which face related production, translation and review costs. Privacy and privilege laws of the foreign jurisdiction must also be considered prior to data transport to the United States, and manufacturers must remember that many E.U. countries have far more restrictive privacy laws.

Proactive Defensive Measures

Given these trends, product manufacturers doing business in both the United States and the E.U. have to be vigilant to ensure their defense counsel is equally coordinated and armed to combat these strategies. Proactive efforts must be undertaken to anticipate and counter these tactics on a substantive and procedural basis. Success is best ensured by a product manufacturer anticipating that the claimants' bar will employ these cross-border litigation tactics.

Companies doing business in the United States and the U.K. should consider:

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- developing strong networks between their own defense counsel regardless of borders;
- protecting against plaintiffs' counsel sharing confidential business documents with claimants' lawyers overseas outside the parameters of protective order;
- employing media advisers to monitor developments at home and abroad for early harbingers of litigation—publicity over regulatory actions, local "expose"-type stories regarding the product or company, or adverse statements of concern by legislators; and
- perhaps most importantly, scrutinizing product differences across borders—including differences in manufacturing, labeling, marketing and product-complaint tracking practices in the United States and the E.U. This will help ensure consistency in the company's product safety measures and regulatory compliance efforts before litigation begins, and help guarantee a better-coordinated defense strategy if it starts.

Based on an article by Paul Llewellyn and Colleen Davies that first appeared in The Lawyer.

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Product Liability Update is published by Reed Smith to keep clients and friends informed of legal developments in product liability law. It is not intended to provide legal advice to be used in a specific fact situation.

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