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CLASS ACTION PRODUCT LIABILITY

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EXPERT FORUM

CLASS ACTION PRODUCT LIABILITY

PANEL EXPERTS

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CD: Could you provide an overview of the pace of class action product liability cases in your jurisdiction over the past 12 to 18 months?

Maher: Product liability claims dominated the Australian class action landscape in the 1990s and early 2000s. The prevalence of product liability claims has decreased over the last decade, with an increase in investor-related, shareholder and consumer protection class actions in Australia. Nevertheless, class actions continue to be brought in Australia, in both the Federal court and some state Supreme courts, in relation to defective products on a regular basis. It remains one of the most common types of class action claims – around 20 percent of all class actions in Australia have been product liability related. Over the past 12 to 18 months, we have seen actions commenced against Reckitt Benckiser, the manufacturer of Nurofen painkiller tablets, in relation to alleged misleading and deceptive representations made about a particular range of tablets, an action commenced against the Ford Motor Company alleging defective Powershift transmission in certain Ford vehicle models and an action commenced against a provider of breast augmentation surgery relating to alleged complications following surgery.

Fleming: Although certifying product liability class actions faces many hurdles, class action filings remain fairly common in the product liability space. In addition to class actions, we have seen trends toward the pursuit of other forms of aggregate litigation continue. For example, plaintiffs' attorneys continue to pursue group remedies through mass actions, multi-plaintiff coordinated litigations, *parens patriae* actions by state and local governments on behalf of their citizens, and qui tam actions. On balance, based on our observations, there appears to be little evidence of abatement in the filing of large aggregate product liability litigations.

Smith: The pace of class action product liability litigation has remained steady over the past 12 to 18 months. Most product liability class actions are unsuccessful and fail at the pleading stage, either because plaintiff's allegations are deficient or because plaintiffs lack standing to bring the claims. In addition, plaintiffs continue to have difficulty establishing the requirements for class certification, particularly given recent Supreme Court decisions that have increased the scrutiny given to class claims.

CD: What are some of the common causes of class action product liability that you are seeing? Do these cases tend to originate domestically or overseas, or both?

Fleming: The trigger event for plaintiffs to file product liability class actions is often media or regulatory attention, typically a regulatory warning or product withdrawal, a new scientific study or a media report addressing safety or efficacy. While regulatory triggers tend to be US-based, they, as well as scientific studies and media reports, may originate overseas. Also, plaintiffs sometimes may seek discovery as to the regulatory environment for the product overseas to attempt to argue that it is pertinent in the US litigation.

Smith: Product liability class actions frequently involve creative efforts by plaintiff lawyers to suggest that representations regarding the product are false. Similarly, there has been an increase in efforts to suggest that plaintiffs did not receive 'full value' for the products they purchased because the products were somehow defective. The product liability class actions tend to originate domestically in the US.

Maher: Product liability class actions commonly arise out of allegedly defective pharmaceuticals and medical devices. Some recent examples include the arthritis drug Vioxx which was alleged to have caused adverse side effects, a claim in relation to individuals who suffered from a congenital malformation and whose mothers, while pregnant, consumed an anti-nausea drug containing thalidomide, and actions relating to defective knee prosthetics and hip prosthetics. A number of older cases concerned defective pacemakers. Generally speaking, cases tend to originate domestically although many have an international aspect to them due to the fact that many defective pharmaceuticals and medical devices are designed and manufactured overseas.

> **"Around 20 percent of all class actions in Australia have been product liability related."**
>
> *Graham Maher, Bird & Bird*

CD: Have any recent legal or regulatory developments affected product liability cases?

Maher: In late 2016, the Full Federal Court of Australia handed down a landmark decision in *Money Max Int Pty Ltd (Trustee) v QBE Insurance*

Group Limited which allowed, for the first time in Australia, what is commonly known in the US as a 'common fund order'. This is an order requiring all group members of a class action to pay a portion of the litigation funder fees, regardless of whether or not they have not entered into a funding agreement. The decision is significant in that it has paved the way for greater judicial oversight of litigation funding regimes in Australia, and may result in product liability class actions being brought faster and with greater member participation. In the regulatory space, Australia has a proactive regulator in the field of competition and consumer law. As a result, over the last few years we have seen a number of class actions being commenced on the back of investigations or proceedings initiated by the regulator.

Smith: The US Supreme Court's recent class action decisions have had a significant effect in constraining class action litigation. The court's decisions in *Wal-Mart Stores Inc. v. Dukes and Comcast Corp. v. Behrend* have brought increased scrutiny to the commonality and predominance requirements for class certification. Similarly, the court's decision in *Spokeo, Inc. v. Robins* has underscored the fundamental requirement that plaintiffs establish their standing to sue by demonstrating that they have suffered an actual, concrete injury. Thus, for example, in *Hochendoner v. Genzyme Corp*. the First Circuit rejected a product liability class action alleging that a pharmaceutical company sold products that were contaminated and did not produce sufficient product to meet demand on the ground that plaintiffs did not sufficiently allege specific harm. Likewise, in *Eike v. Allergan, Inc*., the Seventh Circuit vacated class certification orders for consumer class actions alleging that eye medication dispensers had wasteful and inefficient dropper sizes, concluding that this was not an actionable injury. Thus, while plaintiffs continue to develop creative theories to support their class action claims, recent Supreme Court precedent continues to have a significant impact in curtailing the scope of class action litigation.

"The US Supreme Court's recent class action decisions have had a significant effect in constraining class action litigation."

Douglas Smith, Kirkland & Ellis LLP

Fleming: The US Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* continues to be important regarding class certification issues, including with respect to the evaluation of common issues and the appropriateness of injunctive relief. In addition, the US Supreme Court has recently issued a series of decisions on personal jurisdiction over out-of-state defendants, which should be considered by plaintiffs in deciding whether to bring a putative nationwide class action in the forum of their choice. Finally, in many regulated industries, such as the pharmaceutical and medical device space, preemption of state law by federal regulation is a perennial issue that will continue to be litigated in product liability class actions.

CD: Could you highlight any recent, high-profile product liability class actions which caught your attention? What lessons can we draw from their outcome?

Smith: Over the last several years, there has been significant litigation involving claims that front loading washing machines are designed in a way that allows mould to develop. This litigation is interesting for a couple of reasons. First, the litigation is somewhat aberrational in that these claims survived scrutiny at the pleading stage and resulted in rulings granting certification of a class. Second, the litigation demonstrates how taking cases to trial can be a successful strategy for defendants. Defendants in the multidistrict litigation (MDL) proceedings took these claims to trial and prevailed, illustrating that even where plaintiffs succeed in avoiding dismissal and in achieving class certification, there is no certainty that defendants will settle the claims or that plaintiffs will recover.

Fleming: The US Supreme Court recently held in *Bristol-Myers Squibb Co. v. Superior Court* that plaintiffs could not use the presence of a handful of California plaintiffs to anchor a large, nationwide pharmaceutical product liability litigation in California state court. The decision may significantly affect how plaintiffs' attorneys structure their filings and where they seek to file. In addition, the US Court of Appeals for the Second Circuit recently affirmed summary judgment due to lack of expert testimony on causation in *In re Mirena IUD Prods. Liab. Litig*., rejecting attempts by plaintiffs in that case to establish medical causation by purported 'admissions' by the defendant.

Maher: One action that comes to mind is the decision of the Federal Court of Australia in *Stanford v DePuy International Ltd*. This case concerned two separate class actions commenced by patients who had received hip implants manufactured by DePuy International Ltd. The members of the class action alleged, among other things, that the implants were not fit for purpose and were unsafe. DePuy defended the class actions and the matter proceeded to a 17-

week trial. Almost nine months after the end of the trial, but before judgment was delivered, the parties agreed to settle the proceedings for $250m. The decision concerned the parties' application for the court's approval to settle the proceedings, which is a prerequisite for settling class actions in the Federal Court.

CD: What are some of the specific challenges facing accused companies involved in a product liability class action? What steps should form part of their initial response?

Fleming: A product liability class action may require a company to defend itself on many fronts, including legal, regulatory, media, customers and competitors. It can be very important for the company to engage attorneys across jurisdictions and to carefully coordinate its efforts with team members across all of the different stakeholders. Taking time at the earliest possible opportunity to determine the best themes and arguments for the defence will ensure that they are properly developed over the course of litigation and make potentially unintentional and inconsistent admissions or waivers of arguments less likely.

Maher: Perhaps the biggest challenge facing accused companies is the fact that Australia is a comparatively 'plaintff-friendly' class action jurisdiction, so much so that in recent years it has become the most likely jurisdiction outside of the US in which a corporation will face a class action. In addition, product liability matters are, by their very nature, often very well-suited for the class action procedure. A party's initial response to a class action claim should include consideration of whether it should 'go on the attack' by asking the court to have the claim dismissed or stayed in its early stages. Such attacks are not uncommon in product liability class actions and there are a number of grounds upon which an attack can be made. These include where the class action has failed to satisfy the threshold statutory criteria, where the costs of distributing any sum that might be awarded as a consequence of the proceedings would be exessive, or where it is in the interests of justice that the class action not continue.

Smith: Product liability class actions often seek significant damages and may be costly to defend. In addition, class action litigation can have collateral effects on the business by calling into question a company's key products. In defending against class action litigation, it is important to plan for each successive stage in the litigation, including challenges to the sufficiency of the pleadings and plaintiff standing, the adequacy of class allegations, and expert proceedings including the admissibility of expert evidence and trial.

CD: In such cases, what factors typically need to be considered when assessing potential damages and evaluating a possible settlement?

Smith: There are a variety of factors that may be considered in assessing potential damages and evaluating potential settlements. These may include the nature and scope of the alleged injury, the venue in which the case is brought, the potential flaws in plaintiffs' argument that the case is appropriate for class treatment, and the costs of defence.

Maher: A company faced with a product liability class action in Australia should always keep in mind that court approval is required to settle the action. When applying for court approval of a settlement, the parties will usually need to persuade the court that the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement, and the proposed settlement has been undertaken in the interests of group members and not just in the interests of the applicant and the respondents. As part of this, the parties will usually be required to address factors such as the complexity and likely duration of the litigation, the reaction of the group to the settlement, the risks of

establishing liability and loss or damage, the ability of the respondent to withstand a greater judgment, and the range of reasonableness of the settlement in light of all the attendant risks of litigation.

Fleming: In any large coordinated litigation, the mechanism of settlement can be as important as the amount. While a class action settlement will allow the defendant to finally dispose of a vast number of claims against it, if its terms are not crafted properly, it may encourage too many 'opt outs' by individual plaintiffs or be subject to challenges on appeal. In contrast, brokering settlement of the 'inventory' of claims held by individual firms or groups of attorneys is another possibility, but it must be executed strategically to avoid paying for frivolous or non-existent claims or encouraging the filing of additional, unwarranted claims.

CD: What general advice can you offer to parties in terms of strategies and tactics that may be deployed to defend a product liability class action?

Maher: Generally speaking, it would be prudent for a defendant to a product liability class action to seek orders at the first available opportunity for the claimants to provide discovery of their documents relating to the key issues in dispute. These documents should give a defendant a reasonably good idea as to the strengths and weaknesses, as well as the value, of the case against it. This will, in turn, inform a defendant's matter strategy, including any potential settlement. Of course, a defendant should also gather and carefully review as much of its own documentation as possible. In many cases, this process will have commenced well before the institution of legal proceedings. An application for security for costs may also be appropriate if the defendant has concerns about the claimants' ability to pay for its legal costs in the event that the class action is unsuccessful.

Fleming: Because aggregate litigation involves a number of claims before one judge, it is extremely important to earn and keep the credibility of the presiding judge. That credibility can be won in a long series of small, kept promises, and it can be lost in an instant with a mistake. To that end, counsel should be fully informed of the case before appearing before the court, not promise more than they know they can deliver, and make sure to follow the court's local rules and the judge's orders. At the time for disposition of the litigation, having greater credibility with the court than your opponent has is an advantage that can turn an entire litigation.

Smith: There are many steps at which class action claims can fail. It is important to take an aggressive approach at each stage of the litigation. Many class actions fail at the pleading stage. Plaintiffs may fail to adequately define the class or incorporate sufficient

allegations to meet the pleading requirements under the Federal Rules of Civil Procedure. In addition, plaintiffs may be unable to adequately demonstrate that they have standing to bring their claims. Class certification is another significant hurdle. Plaintiffs may be unable to demonstrate that the commonality and predominance requirements are satisfied or that a class is an appropriate vehicle for the litigation. Increasingly, class certification decisions include consideration of the admissibility of expert evidence under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

CD: To what extent can the use of expert witnesses influence a product liability class action? What advice would you give to parties on engaging and briefing expert witnesses?

Fleming: Expert witnesses are often critical to product liability class actions, both as to the question of class certification and the merits. Where warranted, defendants should carefully develop challenges to expert testimony proffered by plaintiffs as another basis to defeat class certification. More generally, expert testimony that does not pass scrutiny on key questions such as causation can be devastating to large groups of cases, as was recently observed in the *In re Lipitor* and *In re Zoloft pharmaceutical* litigations. In addition, a defendant should, from the inception of litigation, form an expert team to recruit and develop its own expert testimony in all disciplines potentially relevant to the case.

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Smith: Expert witnesses increasingly play a role in determining whether a class is certified. Challenges to the reliability of expert opinions at the class certification stage are becoming more common. Accordingly, thoroughly analysing expert opinions offered by the plaintiffs' experts is an important step in making a challenge to class certification. Careful preparation before deposing an opposing party's expert is important in mounting a challenge to the admissibility of expert testimony under Rule 702 and

Daubert. On the defence side, experts may be able to point out not only the flaws in a plaintiff's case on the merits, but provide analysis illustrating that the claims are inappropriate for class treatment.

Maher: Expert witnesses have the potential to significantly influence a product liability class action in at least two respects. First, expert evidence is normally required to establish that the claimants have suffered injury and loss as a result of a defective product. Such evidence is usually given by medical practitioners, loss assessors and accountants. Secondly, expert evidence will often play a key role in establishing liability on the part of a respondent to a product liability class action. As part of defending a claim, experts engaged by a respondent are often required to go into detail about the history of the product in question, the existence or otherwise of the defect and the state of the scientific or technical knowledge at the time the product was supplied.

CD: Going forward, do you expect to see an increase in product liability class actions? What steps can companies take now to prepare for a possible claim?

Smith: I do not expect to see an increase in product liability class actions. Nonetheless, companies can expect that such actions will continue to be filed. Careful attention to any representations regarding a company's product can help avoid product liability class actions. Similarly, monitoring regulatory activity that might lead to potential claims can give a company advance notice. Once a claim is filed, there are a number of steps that can be taken to successfully defeat such claims. Encouraging the court to scrutinise the allegations in the plaintiff's complaint to assess whether they have been adequately pleaded, whether plaintiffs have standing to bring such claims, and whether class treatment is appropriate are all important in defeating product liability class actions. In the event the claims move beyond the pleading stage, rigorous scrutiny of plaintiffs' expert evidence and plaintiffs' arguments in support of class certification are important. Even if plaintiffs are able to survive a challenge at the pleading stage, they may find it difficult to identify common issues among members of the class necessary to support class certification.

Maher: Product liability class actions in Australia will likely continue at a fairly steady rate for the foreseeable future. A company can prepare for a product liability class action claim by having a sound risk management procedure in place. The procedure should include steps the company can take to identify any risks to the company arising from defective products and assess the overall impact of each risk on the company's business, and the responses that can be applied to each risk which are proportionate to the potential impact of that risk on the company. The procedure should also include

plans to minimise the cost of a liability issue giving rise to the recall of a type of product.

Fleming: Although forms and structures of litigation are always changing, the appetite for large, aggregate litigations shows no signs of abating. Although it may be difficult to do so, a company can attempt to manage or predict potential trigger events for class action filings, such as by working closely with regulators on major decisions, monitoring scientific literature and engaging a competent outside consulting firm to handle media enquiries, in coordination with counsel. In addition, a company can also adopt general practices that will assist the defence of any litigation – for example, providing training on attention to emails and other company communications to avoid unintentionally creating a document that is not accurate and that opposing lawyers may try to use against it to create liability. CD