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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomediamedia.com

Globalization Could Incite Global Forum Shopping

By Liz McKenzie

Law360, New York (May 27, 2009) -- Increased product globalization could lead to a rise in global forum shopping, and many attorneys believe foreign plaintiffs will continue eying the U.S. as the ultimate plaintiffs' venue.

The rise of the global product market, coupled with the ability to instantly access data from around the globe, has changed how product liability issues are handled worldwide.

As more and more products are sold in multiple markets worldwide, manufacturers and distributors now face liability risks in numerous countries.

"If you create a product in a country and ship it worldwide, you are subject to product liability in each of those countries," said Greg Fowler, co-chair of Shook Hardy & Bacon LLP's international litigation and dispute resolution practice. "Any time you put a product in the stream of commerce, you are exposing yourself to be regulated by laws of other countries."

This practice could lead to international forum shopping by plaintiffs injured abroad, according to Bowman and Brooke LLP managing partner Paul G. Cereghini.

And, according to Cereghini, the U.S. is often the most attractive venue.

"There is no place that offers the opportunities to the plaintiff's side that the U.S. does," Cereghini said. "In many situations, the U.S. will be the forum of choice, and I think it will continue to be for any plaintiff outside the borders of U.S. that can bring a lawsuit here."

Peter Bicks, a partner in Orrick Herrington & Sutcliffe LLP's litigation group that has represented Union Carbide Corp. in several asbestos liability suits, agrees that we're likely to see more foreign plaintiffs attempt to bring cases in the U.S.

"Given the perceived benefits of bringing cases in the U.S., including access to a jury,

punitive damages, liberal discovery and the 'American Rule' on paying for costs, forum shopping to sue in the U.S. will likely increase," Bicks said.

Because many countries operate a "loser pays" model wherein the loser of the lawsuit must pay for both sides' attorneys' fees, many plaintiffs may be discouraged from bringing actions in their home country, tempted instead to try their claims in the U.S.

Sharon Caffrey, co-head of the product liability and toxic torts division at Duane Morris LLP's trial practice group, says "loser pays" systems deter plaintiffs from bringing frivolous or less concrete lawsuits.

"When you have a system where the loser pays, you're going to see less borderline lawsuits," Caffrey said. "You're going to see lawsuits where it is viewed initially that the liability is clear and the damage is well-established."

Plaintiffs may also decide to bring suits in the U.S. because of other factors like the right to a jury trial, differing liability law or the possibility of punitive damages, Cereghini said.

"I think in the future there will be more attention paid to global forum shopping," he said, arguing that plaintiffs may eventually seek venues based on considerations such as the substantive law, damage caps, cost-shifting rules, whether or not there can be a jury trial, limitation periods and the potential for punitive damages.

But foreign plaintiffs also face significant roadblocks to bringing suits, especially class actions, in the U.S., Caffrey said.

"Because of the differences in personal injuries and medical histories of plaintiffs, they do not meet the commonality requirements for a class action except on rare occasion," she said.

They must also be able to demonstrate the injury's connection to the U.S., she added.

"To file a case in U.S. courts, the foreign plaintiff needs to show that the U.S. courts have jurisdiction over the claim. A foreign plaintiff, injured in a foreign jurisdiction, by a product manufactured in a foreign jurisdiction will not have access to the U.S. courts," Caffrey noted.

While many of the cases may be dismissed on the grounds of forum non conveniens, some foreign plaintiffs have managed to successfully argue cases in the U.S.

In January 2009, a district court refused to dismiss the claims of nearly 40 Taiwanese HIV-infected hemophiliacs against Bayer Corp. and Baxter Healthcare Corp., finding California a better venue for the suits than a Taiwanese court for the time being.

A judge for the the U.S. District Court for Northern District of Illinois denied the motion by the two pharmaceutical giants seeking to dismiss three suits within the multidistrict litigation on the grounds of forum non conveniens without prejudice and recommended remanding the cases to the California district courts where the plaintiffs originally filed.

The litigation involves plaintiffs infected with HIV and hepatitis C from a number of foreign countries who have accused the drug companies of continuing to sell the blood-clotting factor concentrate products derived from contaminated blood donors abroad even after withdrawing the same items from the U.S. market.

Though the same judge has already dismissed suits brought by plaintiffs from the U.K., Argentina and Israel on similar grounds, the judge ruled that the circumstances in the Taiwan cases differed enough to justify continuing the suits.

In another recent example, a judge from the Los Angeles Superior Court refused to dismiss a number of lawsuits brought by Nicaraguan farmers against Dole Foods and Dow Chemical alleging that exposure to the pesticide DBCP while working on Dole banana plantations caused them to become sterile.

However, while the lawsuits were not ultimately dismissed for forum non conveniens, a California judge ultimately dismissed the actions in April 2009, finding that the plaintiffs in the two remaining cases had presented fraudulent documents.

In contrast, English and Welsh citizens who filed a lawsuit against Merck & Co. over Vioxx in a New Jersey state court, where Merck is headquartered, were dismissed so that the case could be litigated in the U.K. An appellate court later affirmed the decision.

As a strategy to bring cases in the U.S., many foreign plaintiffs will sue the U.S. parent companies over the conduct of their foreign subsidiaries, Cereghini said.

"Joining a U.S. company for alleged torts in the U.S. weakens the defendant's forum non conveniens arguments by establishing a closer nexus between the acts giving rise to the suit and the venue," Cereghini explained.

Others may try to file claims under the Alien Tort Claims Act, which permits non-U.S. citizens to sue in U.S. federal court to redress human rights violations.

But Cereghini notes, "Tort plaintiffs' lawyers have tried to use the ATCA to gain access to federal courts for cases that really have little to do with human rights."

Plaintiffs may also be able to use the U.S. court system if their home country bars them from filing suits if another has been filed abroad, leaving them without adequate remedy if the suit is dismissed on forum non conveniens.

Under Guatemalan law, for example, the courts of that country are barred from taking a suit that has already been filed in a foreign court, regardless of whether it will ultimately be dismissed. This allows plaintiffs to argue that the U.S. court is their only option.

In a similar move, Nicaragua has discriminatory legislation that it enacted following the banana pesticide litigation that forces foreign defendants who have obtained a forum non conveniens dismissal from a U.S. court to deposit millions of dollars in special bank account to guarantee payment.

In addition, cases dismissed on forum non conveniens are resolved solely through summary proceedings, Cereghini said.

"The idea is that U.S. defendants will forgo forum non conveniens dismissal out of fear that they will be sued in Nicaraguan courts," Cereghini said.

Reed Smith LLP partner Michael Brown, who defended Medtronic Inc. in the Riegel v. Medtronic preemption case, notes: "If there is a mass tort in the U.S., you will see large groups of foreign plaintiffs use the us court system. Some allow them to stay, some send them home."

--Additional reporting by Melissa Lipman