PROFESSIONAL
LIABILITY
Consultants, L.L.C.

Can the E.U. "REACH" America's Tort System?
By: Dr. Karl J. Duff, Ph.D., J.D.
kduff@tempus-plc.com

Europe's "REACH"

In the middle of 2007, the EU's "REACH" chemical testing and safety requirements came into effect. REACH requires EU companies which either import or manufacture chemicals or substances to take certain actions. US firms are familiar with MSDS information. REACH requires a similar approach, but also requires testing, and reporting to a new EU agency called the European Chemicals Agency.

In the US, we can summarily describe our legal system's approach to chemicals as one which generally allows chemicals to be brought to the market and sold until and unless someone is able to show that the chemical is harmful in some way. This harm could be in the form of medical risks or environmental issues – perhaps both. With REACH, the EU's approach is the opposite. To sell these substances in the EU, it is necessary to provide data (based upon testing as needed) to substantiate that the product is indeed safe. We might say that the presumptions are reversed. In the US a company is free to sell chemical products until a problem can be shown. In the EU a company must show there are no problems to get to market. The REACH pre-registration phase-in period lasts for more than a decade and is currently underway.

US chemical manufacturers certainly face REACH's testing and reporting requirements when they sell to companies and consumers in the EU. A critical question, however, is whether and to what extent REACH's regulations impact the US market or US liability parameters. While the language of REACH makes it clear that REACH does not extend specifically to the US market, I would argue that this is not the end of the inquiry. In fact, even if US regulators or legislators choose not to adopt a REACH-like paradigm, REACH may well still impact the liability of US chemical manufacturers and others in the supply/distribution chain.[1]

How could this be so?

It is axiomatic that the American legal system is driven in large part by its tort system. While we certainly have our share of liability-without-fault approaches within the tort system in general (and in products liability specifically), it seems to me that the most significant impact "REACH" is likely to have on the US liability framework is in the area of fault-based liability and the

[1] I would refer the reader to the excellent work of Mr. Andrew Austin, Esq., a senior associate at Freshfields. You can find his insightful analysis at: "Effects of the EU's New Chemicals Regime", **For the Defense**, December, 2007, p. 64 *et seq.*

2205 Riverstone Boulevard
Suite 108
Riverstone Professional Building
Canton, GA 30114

Bus: (770) 345-3577
Fax: (770) 345-3573
Email: kduff@tempus-plc.com

related concept of negligence. For our limited purposes in this brief article, we can postulate that negligence requires a failure to take appropriate levels of care with respect to one's actions – including the manufacture of chemicals and related substances.

American chemical manufacturers must already comply with myriad rules and regulations in a competitive market. They already face a hostile products liability environment, courtesy of our legal system. With REACH, things may be about to become far more complicated.

The definition of appropriate care (required to avoid findings of negligence) is not static. It evolves over time. As Judge Cardozo instructs us in a classic case[2], "Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle … does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be." Governmental actions and rules can play a central part in facilitating this change. First year law students learn from Judge Eldridge in another classic case[3] that "[l]egislative or administrative requirements that persons or businesses conduct their operations in a particular manner and adhere to specified standards, have never been viewed as supplanting tort liability. On the contrary, such statutory or regulatory requirements are deemed to furnish standards by which courts or juries determine along with other circumstances whether or not conduct is negligent." It is this exact notion that should cause all chemical companies, even those whose products never leave the US, to pay attention to some potentially far-reaching implications of REACH.

So how does the EU's chemical regulation program reach the US? Through its requirement that chemical manufacturers "prove the negative" (that is, that their product is safe), REACH potentially establishes a higher standard of care for chemical manufacturers, *regardless of whether any particular product is sold in the EU*.

While compliance with US regulations does not necessarily eliminate claims of negligence, REACH's potentially transoceanic effect means more than ever that simply complying with US law may not be enough. REACH's stringent testing requirement coupled with its online database "will offer the plaintiff's bar a powerful new resource."[4] Austin goes on to argue (correctly, in my view) that the "existence of the database may make it more difficult for companies on either side of the Atlantic to defend chemicals-related product liability litigation."[5]

This could, it seems to me, possibly redefine the state of the practice and, in the process, redefine what is appropriate care – what is (and is not) negligent. As Austin cogently observes:

---

[2] **MacPherson v. Buick Motor Co.** 217 NY 382 (1916).
[3] **Volkswagen of America, Inc. v. Young** 272 Md. 201 (1974).
[4] Note 1, *supra,* at p. 69.
[5] *Id.*

2205 Riverstone Boulevard
Suite 108
Riverstone Professional Building
Canton, GA 30114

Bus: (770) 345-3577
Fax: (770) 345-3573
Email: kduff@tempus-plc.com

> "A defendant who continued manufacturing a substance, or using it in its products or preparations, in ignorance of hazards set out in the [REACH] database, would find it difficult to" [assert certain defense arguments] "or, indeed, defend a more traditional negligence claim."[6]

Furthermore, in the future, as REACH becomes more well known, chemical company defendants may be forced to explain to juries why they tested some of their products (*i.e.*, those bound for the EU) and not others (*i.e.*, those bound for US markets). The plaintiffs bar will no doubt imply that the lack of REACH-like testing requirements in the US renders the US marketplace less safe, and that juries must therefore "send a message" whenever a chemical is found to cause harm in the US.

Conclusion

So: what are American chemical manufacturers to do? They should confer now with their counsel and technical advisors, and that initial conference should be informed by a careful reading of Mr. Austin's analysis. Decisions made now could be of paramount importance in later years as the risk/liability paradigm begins to adjust to the EU's REACH.

Notice: The opinions expressed in this article are ***solely*** those of the author and his firm and are not to be understood as representative of (or binding upon) any other person or entity. No legal advice is provided in this article, and no attorney-client relationship is created or intended, any such relationship hereby being explicitly disclaimed. This article is presented for informational purposes only in the hopes of stimulating thought and discussion in the consideration of an evolving potential liability issue.

-30-

About the author: Dr. Karl Duff has practiced law for more than 30 years and is a former trial lawyer who has also represented engineers as in-house and outside counsel. He is licensed to practice law in Georgia and Illinois. His office is in the Atlanta, Georgia area.

[6] *Id.*

2205 Riverstone Boulevard
Suite 108
Riverstone Professional Building
Canton, GA 30114

Bus: (770) 345-3577
Fax: (770) 345-3573
Email: kduff@tempus-plc.com