Presumptions of defectiveness and direct action against the insurer

Comments on Supreme Court (Civil Chamber) Judgments Nº. 678/2026 of 6 May and Nº. 771/2026 of 21 May

Rebutting evidentiary presumptions concerning safety

The first of the judgments examines the presumptions that may be considered in determining whether a hip prosthesis was defective when it is not possible to examine the specific unit used by the patient.

One of the most interesting issues addressed in relation to presumptions is the value of measures adopted by the manufacturer after the product has already been placed on the market.

The Supreme Court recalls that neither the issuing of safety notices nor the withdrawal of a product necessarily means that the product was defective when it was placed on the market. However, both measures may constitute indications of defectiveness when assessing whether the product provided the safety that the public was entitled to expect, particularly where they were adopted after risks or adverse effects had been identified, exceeding those initially anticipated.

From this perspective, the judgment highlights the importance of being able to explain, during the proceedings, the reasons that led to the adoption of such measures. Where a claim is based on safety communications, subsequently identified contraindications or market withdrawals, scientific, technical and regulatory evidence should be available to place those actions in context and demonstrate that they were not prompted by a product defect. In the absence of sufficient explanation and supporting evidence, those measures may constitute decisive evidence of defectiveness.

The judgment provides a clear warning as to the importance of these matters in product liability proceedings. The explanations and evidence submitted in relation to the measures adopted will be highly relevant. This should be considered when assessing whether to adopt such measures and how they should be communicated.

The law applicable to the insurance contract does not preclude a direct action

In the second judgment, the Supreme Court recalls that, in cross-border disputes, the person having suffered damage may bring a direct action against the insurer even where the insurance policy is governed by foreign law that does not provide for such an action.

The Rome II Regulation permits a direct action where it is provided for by the applicable law to the non-contractual obligation or by the applicable law to the insurance contract.

Accordingly, where liability for a defective product is governed by Spanish law, the person having suffered damage may bring a claim directly against the insurer even if the insurance policy is governed by foreign law that does not provide for that mechanism.

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