

IADC Committee Newsletter

PRODUCT LIABILITY

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High profile recalls of Chinese imports and the implementation of the Consumer Protection Safety Act of 2008 highlight the necessity for companies to diligently address liability issues before importing products into the United States.

Made in China: Consumer Product Lawsuits Imported to the United States

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ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the Committee membership. Opportunities for networking and business referral are plentiful. With one broadcast e-mail, members can obtain information on experts from the entire Committee membership.

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Chinese imports accounted for over 60% of all recalls administered by the Consumer Products Safety Commission in 2007. High profile recalls of pet food, toothpaste, toys, and milk products have increased awareness and put plaintiff lawyers and consumer groups on alert. At the same time, American importers of Chinese products must address their increased risk and exposure to product liability lawsuits.

On October 14, 2008, the United States District Court for the District of New Jersey held a fairness hearing and approved the class action settlement of *In Re: Pet Food Products Liability Litigation*, MDL Docket No. 1850, Civil Action No. 07-2867 (NLH) (D. N.J.). The lawsuit arose after Chinese, American and Canadian pet food makers recalled pet food that was manufactured with contaminated wheat gluten and/or rice protein concentrate. Thousands of cats and dogs across the United States and Canada suffered kidney disease, which was sometimes fatal, after consuming the contaminated food. The defendants in the lawsuit collectively agreed to contribute \$24 million to the settlement. With certain limitations, eligible class members may receive a cash payment of up to 100% of their substantiated economic damages related to their pet's consumption of the recalled products, including veterinarian bills and other expenses related to the pet's illness.

Shortly after the pet food recall occurred in 2007, FDA seized an import of toothpaste that was contaminated with Diethylene glycol (DEG), also known as "diglycol," a poisonous chemical used in antifreeze and as a solvent. About the same time, RC2 Corporation, a toy distributor, recalled 1.5 million Thomas & Friends™ wooden railway vehicles that contained lead paint. The National Highway Traffic Safety Administration then forced a New Jersey firm to recall 450,000 defective light truck tires. Less than two months later, toy maker Mattel recalled nearly one million toys in the United States because the toys were decorated with lead paint. Days later, Mattel recalled another 9 million toys, citing problems related to small, powerful magnets in the toys which can cause injuries when more than one is

swallowed. All of the products were manufactured in China. In the United States, the tire and toy recalls were followed by civil suits against American companies that imported the products; the toothpaste seizure resulted in criminal charges against American executives.

Most recently, melamine, a chemical used to make plastics and fertilizers (and the same chemical that was in the contaminated pet food) was discovered in Chinese-made infant formula. Melamine artificially inflates the reading for protein levels when the formula is tested. Until now, formula was not tested for melamine because regulators did not suspect the ingredient was being added. Tens of thousands of infants around the world have been sickened and four died. The United States Food and Drug Administration has recently increased inspections and product testing in response to the melamine contamination. As a result of the increased scrutiny, FDA has found melamine in a number of products, including Blue Cat Flavor Drinks, Mr. Brown instant coffee and milk tea products, White Rabbit Creamy Candies, YILI Brand Sour Milk Drink, and Koala's March Crème filled Cookies. All of the products, including any Chinese-made infant formula, are under recall in the United States.

The parents of some of the children who died filed lawsuits in China against the state-owned company, Sanlu, that apparently made most of the tainted product. So far, the Chinese courts have refused to hear the lawsuits.¹ Frustrated with the Chinese courts, on October 22, 2008, one family announced that they may sue a U.S.-based subsidiary of one of the Chinese infant formula manufacturers in the United States.² Such a case would face an enormous jurisdictional hurdle, as the only connection to the United States is the subsidiary's alleged presence in Maryland.

¹ Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. Times, Oct. 17, 2008 at A1.

² *Parents May Sue in U.S.*, RADIO FREE ASIA, Oct. 22, 2008, <http://www.rfa.org/english/news/milk-10222008050819.html>.

According to the U.S. Consumer Product Safety Commission (CPSC), in the past decade importation of consumer goods to the United States has more than doubled.³ Forty-two percent of those imported products came from China, and the value of imports from China has nearly quadrupled during this period.

Today, imports account for 44% of consumer goods sold in the United States, but they make up more than 80% of the recalls that the CPSC administers each year. The CPSC announced 473 recalls in fiscal year 2007 (Oct. 1, 2006-Sept. 30, 2007). Of those recalls, 389 (82.4%) were imported products, and nearly three-quarters of the imported products recalled were from China. Over the past five years, recalls of products imported from China have risen disproportionately to the number of products imported. It has also risen disproportionately to the number of recalls of domestic-made products and imports from the rest of the world.

Whatever the reason for the disproportional relationship, the message is clear that American companies that import goods from China are under an increasing risk of facing a recall and product liability lawsuits. Additionally, tort law in China has not advanced to a point where there is meaningful recourse available to injured parties in that country. Thus, American importers are both the front line of defense, and the front line of attack.

Under the Consumer Protection Safety Act (CPSA) and related regulations, American importers of consumer goods must notify the CPSC if they receive information supporting the conclusion that, among other things, a product fails to comply with consumer product safety rules, voluntary consumer product safety standards upon which the CPSC relies, or creates an unreasonable risk of serious injury or death. 15 U.S.C. § 2064. The importer/distributor may then be required to implement a recall of the dangerous product. *Id.* An American importer that fails to report a defective product can face

finer up to \$100,000 per violation, not to exceed \$15,000,000 for series of related violations. 15 U.S.C. § 2069; 69 Fed. Reg. 68884. Criminal penalties and fines may be imposed for willful violations. 15 U.S.C. § 2070.

In August 2008, President Bush signed into law the Consumer Protection Safety Improvement Act (CPSIA). The CPSIA expands the monitoring and enforcement authority of the CPSC. One of the main components of the CPSIA is stronger regulation of children's items. The Act imposes more stringent restrictions on the amount of lead and phthalate that can be contained in children's products and toys. The CPSIA imposes new labeling requirements related to choking hazards. It also imposes new testing requirements, and starting November 12, 2008 importers must certify that many imported product conform to all rules, bans, standards, or regulations enforced by the CPSC.

American importers must be diligent to address potential liability issues. Companies should insure that they have proper insurance and other protections in place. For instance, U.S. importers should review their contracts with their Chinese manufacturers. They should require Chinese exporters to comply with all applicable United States product quality and product safety laws, and provide indemnifications if they fail to do so. American companies should consider obtaining local representation in China in order to enforce the indemnifications, if necessary. Obtaining jurisdiction and enforcing judgments against Chinese companies (which are often state-owned) pose numerous jurisdictional and collection problems. American companies should also consider requiring Chinese exporters to obtain appropriate insurance coverage from an American or international insurer that will protect the companies in the event of a recall or lawsuit. Finally, if an American company is faced with exposure due to a recall or notice of a defective product, the company should seek advice from class action defense counsel regarding steps that can be taken in the face of a lawsuit.

³ United States Consumer Product Safety Commission, *Import Safety Strategy*, p. 1 (July 2008).



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