

Client Alert

June 22, 2015

Recall, Enforce, Repeat! CPSC and DOJ Team Up for Another Enforcement Action

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The United States Consumer Product Safety Commission (CPSC) continues to escalate its enforcement efforts. Last week, the United States Department of Justice, on behalf of CPSC, filed suit against Spectrum Brands, Inc. (“Spectrum”). *United States v. Spectrum Brands, Inc.*, No. 3:15-cv-00371 (W.D. Wisc.). This is CPSC’s second enforcement lawsuit filed in 2015—yet another year that will likely set records for CPSC penalties.

The complaint alleges that Spectrum not only failed to comply with CPSC reporting requirements, but also allowed hundreds of defective coffeemakers to be sold *after* a 2012 recall of the products. CPSC seeks both civil penalties and injunctive relief. While Spectrum has indicated that it will “vigorously defend itself” in this matter, this CPSC-backed lawsuit should be viewed as a warning to similarly situated companies deciding whether or not to report products containing potential hazards. This is especially true in light of the [previous CPSC-backed lawsuit](#) filed less than two months ago against a retailer for alleged reporting violations and misrepresentations. Companies may also want to look to this lawsuit when deciding whether or not to pursue settlement options following a CPSC civil penalties investigation in order to avoid litigation.

REPORTING STANDARD

The Consumer Product Safety Act (CPSA) requires that manufacturers, distributors, and retailers “shall immediately inform” CPSC of any potential substantial product safety hazards or unreasonable risks of serious injury associated with their products. According to CPSC, “immediately” means “within 24 hours.” 16 C.F.R. § 1115.14(e).

THE ALLEGATIONS AGAINST SPECTRUM

The complaint alleges that in November 2014, Spectrum merged with Applica Consumer Products, Inc. (“Applica”), with Spectrum surviving and assuming all assets and liabilities of Applica.

According to the complaint, Applica manufactured approximately 150,000 coffeemakers between January 2008 and April 2012. As early as February 2009, Applica began hearing from highly concerned consumers who reported that the coffeemaker’s carafe handle could break and allow hot coffee to spill. The complaint lists 21 specific consumer reports received from 2009 through 2011. Many of these consumers were obviously concerned and upset. They saw the carafe as a potential danger, making comments that “[t]his carafe should be recalled because of burn danger!!!” and “this is a seriously defective product!”

In March 2012, Applica was served with a class action complaint over the carafe handles. It wasn’t until April 3, 2012, that Applica submitted its Section 15(b) report to CPSC. On April 27, 2012, Applica followed up with an amended and supplemental report. By that time, Applica had received approximately 1,600 consumer reports “of the handle splitting, breaking, or separating from the carafe of the Coffeemaker, including more than 60 reports of related burns.”

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On June 1, 2012, Applica and CPSC issued a joint press release announcing a recall of the products. Initially, the remedy was a replacement carafe but the recall was updated to ask consumers to stop using the coffeemakers altogether and contact Applica for a full refund.

The complaint charges Spectrum with knowingly failing to “immediately inform the CPSC upon obtaining information that reasonably supported the conclusion that the Coffeemaker created an unreasonable risk of serious injury, in violation of 15 U.S.C. §§ 2064(b)(4) and 2068(a)(4).” The government claims that the violation was ongoing from the time Spectrum obtained information concerning the “unreasonable risk of serious injury” until it adequately reported this information to CPSC.

The alleged violations extend beyond reporting obligations. For nine months following the recall, Applica continued to distribute several hundred recalled coffeemakers. Applica notified CPSC of this error in late July 2013. On August 15, 2013, Applica and CPSC issued a second recall notice for the 641 coffeemakers that were sold after the initial June 1, 2012 recall.

On top of Applica’s past violations, the complaint attacks Spectrum’s current compliance efforts (as Spectrum assumed Applica’s liabilities). According to the government, Spectrum still hasn’t “implemented and maintained a reasonable and effective program or system for complying with the reporting requirements of the CPSA and related regulations and the CPSA’s prohibition on the sale, distribution or importation of recalled products.”

The complaint seeks civil penalties for “each separate violation, and the related series of violations.” It also seeks injunctive relief in the form of compliance and the establishment of an internal compliance program.

CPSC OVERSIGHT AND INCREASED ENFORCEMENT

This lawsuit continues the trend of increased CPSC enforcement, which has largely been directed at unsafe products and associated reporting violations. CPSC-backed lawsuits have historically been rare. Before this year, CPSC had only filed three lawsuits and one administrative complaint, all seeking mandatory recall remedies under Section 15 of the CPSA. But in the past two years, CPSC has significantly increased its assessment of civil penalties stemming from companies’ failures to report potential defects.¹ Now, in a flurry of activity, CPSC has initiated two separate lawsuits enforcing provisions of the CPSA within a two-month period.

This lawsuit is likely the result of settlement negotiations that have fallen through. Most civil penalties investigations brought by CPSC end in settlement. The alternative isn’t great. CPSC carries a big stick and isn’t afraid to wield it, as seen with the litigation and publicity surrounding rare earth magnets.² Going to the mat with CPSC means litigating in federal court—a very public forum compared to settlement negotiations. But when a company believes it has strong defenses or a sympathetic position and CPSC still demands high civil penalties and rigorous internal compliance programs, companies may be willing to fight CPSC in open court. Depending on the outcomes of these recent lawsuits, CPSC may become more aggressive in referring cases to the Department of Justice. Increased litigation may encourage CPSC to raise penalty demands and, as a result, increase the pressure on companies to settle.

¹ “CPSC Penalties to Increase Beyond ‘Cost of Doing Business,’” Morrison & Foerster Client Alert, Mar. 3, 2015, *available at* <http://www.mofo.com/~media/Files/ClientAlert/2015/03/150303CPSCPenaltiestoIncrease.pdf>.

² See “The Epic Buckyballs® Saga Settles,” Morrison & Foerster Client Alert, May 20, 2014, *available at* <http://www.mofo.com/~media/Files/ClientAlert/140530BuckyballsSagaSettles.pdf>.

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To avoid this pressure, we advise manufacturers, distributors, and retailers of products to maintain clear and well-understood policies for evaluating and reporting on potential product hazards. These policies should be up-to-date and clearly communicated to company employees. Additionally, recalling companies should implement safeguards and procedures to avoid distributing recalled products into the stream of commerce. Once in CPSC's crosshairs, careful negotiation with a healthy dose of cooperation may be the best solution for companies fearful of the high costs, adverse publicity, and the uncertainty that comes with litigation.

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