

CPSC Could Be Coming Around On A Litigation Strategy

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The U.S. Consumer Product Safety Commission continues to escalate its enforcement efforts. Recently, the U.S. Department of Justice, on behalf of the CPSC, filed suit against Spectrum Brands Inc. See *United States v. Spectrum Brands*, No. 3:15-cv-00371 (W.D. Wisc.). This is the 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. The 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 requires that manufacturers, distributors and retailers "shall immediately inform" the CPSC of any potential substantial product safety hazards or unreasonable risks of serious injury associated with their products. According to the CPSC, "immediately" means "within 24 hours." 16 C.F.R. Section 1115.14(e).

Allegations Against Spectrum

The complaint alleges that in November 2014, Spectrum merged with Aplica Consumer Products Inc., with Spectrum surviving and assuming all assets and liabilities of Aplica.

According to the complaint, Aplica manufactured approximately 150,000 coffeemakers between



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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 such as: "This 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 the 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."

On June 1, 2012, Applica and the 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. subsections 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 the CPSC of this error in late July 2013. On Aug. 15, 2013, Applica and the 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. Over the past few years, the enforcement trend has been evident in increasing penalties against manufacturers over allegations of unsafe products and associated reporting violations.

CPSC Chairman Elliot Kaye has repeatedly stated that the commission will seek higher penalties. Early this year, he announced his plans to authorize the CPSC to issue fines up to the \$15 million cap. Further, in an official statement announcing a recent multimillion dollar fine, Chairman Kaye warned: "While this well-deserved civil penalty is not even close to the level Congress authorized and expected when enacting the Consumer Product Safety Improvement Act, I have put violators on notice that we will seek

much higher penalties, as appropriate.”

In analyzing penalties assessed, it seems that the CPSC is serious about backing up Chairman Kaye’s statements. In 2014, the CPSC imposed a record \$12.2 million in fines for failure to report product safety hazards or for selling recalled products. That was more than double the \$6 million in total penalties assessed in 2013, which was up from \$4.3 million in 2012. The total could potentially double again this year; 2015 is not even half over and the CPSC has already fined companies more than \$11 million.

The enforcement mandate does not appear targeted at a specific industry or a particular point in the distribution chain. The penalties assessed over the past few years have ranged from retailers to manufacturers, and from home appliances to home furnishings to children’s products. The common theme is reporting violations — including significant delays in reporting multiple events or failure to immediately report a death or serious injury.

Where companies won’t agree to fines, it appears the CPSC is no longer shy about litigation. Historically, CPSC-backed lawsuits were rare. Before this year, the CPSC had only filed three lawsuits and one administrative complaint, all seeking mandatory recall remedies under Section 15 of the CPSA. 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 the CPSC end in settlement. The alternative isn’t great. The CPSC carries a big stick and isn’t afraid to wield it, as seen with the litigation and publicity surrounding rare earth magnets.[1] Going to the mat with the CPSC means litigating in federal court — a very public forum compared to settlement negotiations.

Though we don’t expect the rapid-fire filings to continue, we do expect to see an increase in CPSC litigation via the DOJ. Depending on the outcomes of these recent lawsuits, the CPSC may become more aggressive in referring cases to the DOJ. As the CPSC continues to push penalties toward the \$15 million cap, more companies will push back. If a company believes it has strong defenses or a sympathetic position, it may risk litigation rather than concede to the CPSC’s high demands. However, the CPSC will undoubtedly use the threat of seeking even higher penalties in litigation to pressure companies to settle.

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 the 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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[1] 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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