

Product liability, product recall and impact on brand. What in-house counsel need to know

Shook, Hardy & Bacon's Alison Newstead discusses the practical steps general counsel need to know to plan for and respond to product safety concerns

When the safety of a product is called into question it can have far-reaching, significant and long-term effects on a brand. Giving prior due consideration to the potential risks faced by the company can be of substantial assistance in managing potential brand damage.

There are two substantive threats when it comes to potentially unsafe goods: product liability claims and product recalls. How each of these play out in practice – and the speed at which brand reputation can be affected – can be startlingly different.

Product liability claims often have a much more slow-burning effect on the company and brand. They are potentially – but not always – easier to manage and control. On the other hand, product recalls can often be much more immediate and unpredictable. Once the decision to recall is made, matters move swiftly and impact on a brand can be extremely damaging, with share price, consumer confidence and sales revenue falling sharply.

Recognising how to manage the potential risks and putting into place effective processes prior to safety incidents arising can help diminish negative impact.

The product liability arena

Product liability claims are brought by consumers who have suffered personal injury or damage to their property. In the UK (and other EU jurisdictions), the key issue on which the court will be focused is whether a product is 'as safe as persons are generally entitled to expect.' Liability is strict: if a consumer can prove defect, causation and damage, then he will have a successful claim. There is no need to prove any negligence on the part of the manufacturer.

Whether a defect exists and whether there is a causal link between defect and damage is likely to form the basis of the dispute between the parties. The parties will rely on expert evidence to support their positions and, particularly in the pharmaceutical and medical device field, there will often be competing scientific opinions and studies which support or refute claims.

Public opinion as to the safety of a product which is subject to a claim may well be swayed as scientific studies are issued. To this end, the media attention given to – and the public confidence in – a product may fluctuate over a period of time. Scientific evidence, particularly if issued by an independent third party, can influence the momentum of claims in both a positive and a negative way. It can mean the difference between the floodgates opening and claimants being stopped in their tracks.

Can businesses anticipate such claims and take steps to protect the brand accordingly?

Having knowledge of what safety issues may be concerning your customers is a vital indicator as to potential problems with your product and what claims may be coming your way.

It is common practice for businesses to monitor social media to track what customers are saying about products and whether there are any emerging trends which should be acted upon. Your business should be tracking customer complaints as a matter of course. Using information gathered by your customer services team is a useful source of information, as are warranty claims and repair records.

Being aware of claims that are being brought in other jurisdictions will also help you plan ahead. Product liability claims that are threatened or underway in one jurisdiction will be good indication of forthcoming claims in another jurisdiction. Tracking product liability claims in the US in particular is often a good barometer of what claims are likely to later arise in the UK and Europe.

Brand damage will quickly spread across borders. Your business will be keen to disseminate a consistent global message in light of potential litigation. It is important to work with colleagues in other jurisdictions to ensure that a uniform global approach is taken to defending cases and managing any potential damage to the brand.

Remember that a safety issue may relate solely to your company's product, such as a specific manufacturing defect in one of your factories. However, it may also span an entire industry – this is particularly common in industries where component parts are sold to many different

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manufacturers for the same type of product. Keeping abreast of legal action against your competitors can also prove a useful tool in gauging what may be in the pipeline. Once claims commence—particularly on the scale of a group of actions—it may be that you will need to work with competitors to defend the safety of a particular type of product. To this end, brand reputation of an entire industry may be at stake.

Brand management when a claim has been commenced

Practice differs across Europe, however in the UK there is a ‘pre-action’ period in which parties are obliged to try to resolve claims before they are formally issued at court and served on the defendant. Once claims are issued and served there is the possibility of a third party obtaining details of the claim from the court record. The benefit of the pre-action process is that the matter is being dealt with outside of the court process and public knowledge and interest can be minimised. If the claim is settled, there is even a possibility of including a confidentiality clause in any settlement agreement (albeit these can be difficult to enforce).

Attempting to resolve a claim at the pre-action stage does not necessarily mean that publicity will be limited and the brand protected. Claims which are likely to be brought on a group action basis are likely to attract media attention regardless of whether the claim has been formally commenced in court.

Claimant lawyers commonly advertise for potential claimants to contact them in order to join a group action. Claims are often based on emotive issues, such as serious, life-changing injuries affecting vulnerable groups, such as children. Such cases commonly attract significant – and negative – press coverage for the defendant company.

Managing brand in the wake of a product liability claim is not an easy task. However, those responsible for brand protection should take the lead from the legal team, meeting any speculation and conjecture with fact.

Product recall

With a product recall the stakes are often much higher; a brand reputation which has been built up over many years can be destroyed overnight.

How brand may be affected in a product liability claim and a product recall is very different. In a product liability claim a claimant is required to prove, on the balance of probabilities, that a product is not as safe as he is generally entitled to expect. Claims may be settled without any admission as to liability by the defendant manufacturer. Equally, until a judgment is handed down at trial, whether a product is actually unsafe remains in dispute.

With a product recall the landscape is altogether different. A potential safety issue is brought to the attention of the company—whether as a result of an emerging trend or a specific incident. A risk assessment is carried out to determine the nature of the hazard and the risk it poses and a decision is made as to whether any corrective action needs to be taken – whether that be changing the product’s user information, changing the warnings, withdrawing the product from the supply chain or launching a full-scale recall from consumers.

Completing a risk assessment and deciding what corrective action (if any) to take are often carried out under extreme pressure. There are time limits within which a company must inform a regulator of a potential safety issue and criminal penalties attach to any delay in making such a notification. Coupled with this is the huge responsibility that comes with taking the decision to recall a product. There are inevitable implications on the product brand and significant financial consequences for the business. Manage the recall effectively and the damage can be minimised. Manage the recall badly and the results could be disastrous.

Taking proactive steps to avoid common pitfalls can significantly improve how the recall is viewed by the public and the media and limit damage to your brand.

Early identification of a potential safety issue

Having a multi-faceted approach to spotting safety issues and a system to unite the information and analyse its potential significance is crucial. If issues can be spotted early on, then the businesses can act before there is any significant injury or damage to property. The

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message to the market is also more positive, even if the ultimate action is a recall. It will be possible to say that the company's proactive internal monitoring systems have identified a potential safety issue and that prompt action is being taken to ensure the safety of customers.

Prompt notification to regulators and consumers

Regulators across all industries encourage early notification of a potential safety issue – even if information is still being collated and risk assessments have yet to be completed. Companies commonly fear 'lifting their head above the parapet' if a risk assessment ultimately concludes that there is no safety issue. They struggle to justify making a notification prior to the completion of a risk assessment. However, more often than not, it is prudent to notify the regulator as soon as a potential safety issue arises. Depending on the industry concerned, the timeframe within which a company must notify regulators is very short: a matter of days if the risk is serious. Failure to notify within the requisite timescales is an offence.

Failing to act promptly on available information is also viewed extremely negatively by the public, particularly if the delay relates to financial gain. History has shown that companies that sit on such information undergo considerable criticism in the press once their delay is exposed.

Implementing an effective recall programme

Once a safety issue is identified, careful thought needs to be given as to the corrective action that needs to be taken. Action can take many forms; getting it right can put your company at a significant advantage with customers.

Depending on the nature of the product, a repair may be appropriate. This repair could be carried out in the customer's home, at an authorised service repair centre or perhaps by sending the product back to the manufacturer. Whatever solution is adopted, it has to be well-planned and executed. Consumers do not hesitate to air their frustrations of a badly executed recall online.

The availability of replacement parts, qualified engineers and staff to schedule home visits all present challenges in keeping customers happy. Some customers will also not want a repair, they will want an entirely new product. These are challenges that need to be considered and addressed. Logistics should be an integral part to any recall plan.

Although a timely response is important, sourcing replacement parts and products should be carried out with care. There have been numerous instances in which companies have rushed to source replacement parts only to then find them to be unsafe.

For low-value goods where a repair is uneconomical and a return of the product is requested, consideration needs to be given as to how a customer will be compensated for their loss. Sometimes – particularly with small food items – a refund or straight swap is offered. Slightly more expensive consumer goods pose a different challenge. If there is no direct alternative available, then a voucher or similar product may be appropriate. The target market must be carefully considered. There should be no inherent gain for the company; to this end, vouchers to spend in the shop that sold the unsafe product are sometimes viewed negatively.

Saying sorry

Significant media attention is often given to whether a company has apologised to its customers. Some of the most successful recall campaigns have been in the wake of a genuine and timely apology, often from the company's CEO or someone of equivalent standing. Failure to say sorry, or producing an anodyne company statement are often the basis for negative PR. Many companies are concerned that by saying sorry they are compromising the company's position in respect of future litigation. Whilst future litigation should be a consideration, the fact that the company has carried out a recall on the back of its own risk assessment is likely to mean that any genuine claims for compensation are likely to be met in any event.

Having a recall plan

Having a clear, documented recall plan can help to ensure that should a safety issue arise, the company can swing into action quickly with all the right people on board. A dry run of the plan will help identify roles and responsibilities and ensure that effective decisions can be taken when most needed. ■

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