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Does the Legal Department Have a Role in Preventing a Product Recall?

Legal experts talked with Corporate Counsel about what corporate law departments can do before, during and after a product recall or other corrective action to prevent, negotiate and mitigate the outcome.

By Kristen Rasmussen

The role of a company's top lawyer has expanded so much over the past several years that, according to legal experts, it now may even extend to helping prevent a product recall.

And probably no one knows this better than Robert Normile, executive vice president, chief legal officer and secretary at toy-making giant Mattel Inc. Last month, all models of Fisher-Price Inc.'s Rock 'n Play sleepers were recalled following reports of infant deaths while using the product. At least four class action lawsuits have been filed, including one against Amazon.com, alleging the recall of the 4.7 million products is inadequate.

Mattel, based in El Segundo, California, owns Fisher-Price, based in East Aurora, New York,



Fisher-Price Rock 'n Play Sleeper. Courtesy of Fisher-Price

the latter of which seemingly has not had a general counsel since February 2018. A Mattel spokesperson did not immediately respond to either an email or phone request for comment

about the makeup of the companies' legal departments.

Preventing a recall, legal experts told Corporate Counsel, begins well before a product goes to market.

It “is about ensuring that the design, development, manufacture and marketing of your product is kept under close scrutiny,” Alison Newstead, a partner/solicitor at Shook, Hardy & Bacon in London, said in an email, adding that keeping a watchful eye on the manufacturing process and quality control measures is also extremely important, particularly when manufacturing is carried out overseas.

“Product recalls often stem from products not being manufactured to specification; both in terms of design and materials,” she said. “Some companies even ‘parachute in’ quality control managers to overseas production plants to ensure that production continually meets the requisite standards.”

Tracking social media also is important to help ensure that the company “is getting ahead of the storm,” said Colin Kelly, a partner at Alston & Bird.

“In these situations, most of the time you want to be in a proactive stance, not reactive because

if you’re in reactive mode, you’re already losing the battle,” he said.

To that end, Kelly said, companies should always be on the lookout for an unusually large number of negative product reviews, especially products for children, the elderly and animals.

A corporate law department also plays a significant role in negotiating with various regulatory agencies as to what corrective action, if any, should be taken, the experts said. Since the agencies—whose main focus is understanding the potential safety issue and the level of risk that it poses to consumers—encourage “two-way discussions,” it is “imperative that company lawyers engaging in discussions with regulators have a complete and accurate assessment of the facts from which the safety issue arises and a comprehensive and sound analysis of the risk posed,” Newstead said.

In addition to the legal department, other units, including the engineering departments, should be heavily involved in this assessment, Kelly said, adding that engaging an outside expert who

may have designed the product differently may be warranted.

Once the recall launches, the legal team’s involvement is likely focused on reporting response rates to regulators and dealing with their follow-up questions, Newstead said.

“It is possible that additional and/or alternative corrective action will need to be taken if response rates are not meeting the levels deemed satisfactory by the regulator,” she said.

She continued of the legal department’s role post-recall: “The legal department will also inevitably be involved in managing post-recall litigation. A strategy will need to be adopted as to addressing post-recall claims, which will see an upward spike. Claims will need to be thoroughly investigated to ensure that they relate to the actual products recalled. Often the number of spurious claims also sees an increase.”

Kristen Rasmussen is an Atlanta-based reporter who covers corporate law departments and in-house attorneys.