

Product Recall

In 22 jurisdictions worldwide

Contributing editors

Alison M Newstead and Harley V Ratliff



2015

**GETTING THE
DEAL THROUGH** 

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DEAL THROUGH 

Product Recall 2015

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Global Overview

Alison M Newstead and Harley V Ratliff

Shook, Hardy & Bacon International LLP

Product recalls continue to occur at an ever increasing rate. In the US, the Federal Food and Drug Association's Centre for Devices and Radiological Health recently reported that the number of medical device recalls increased by 97 per cent between 2003 and 2012. Similar increases have been seen across other consumer product industries. Although by no means alone in terms of high volume recalls, General Motors Co recalled more than 29 million vehicles in 2014. Barring rare cases of malicious tampering, each recall represents a breakdown of risk management, whether in design, manufacture or packaging, in communicating necessary information about the product's characteristics, or in foreseeing ways in which a product might be innocently misused.

The recalls that do have a high profile shine a powerful light on how damaging these failures can be – not just potential injuries for consumers and others at risk – but to the reputations of the companies responsible for the products and the value of their brands. The legal consequences are becoming increasingly damaging too. In June 2009, the toymaker Mattel agreed to pay US\$2.3 million in civil penalties in the United States for violating a federal lead paint ban that led to the recall of millions of its Barbie, Dora the Explorer and other popular toys in 2007. A Japanese court sentenced four former senior executives at Mitsubishi Motors to three years' imprisonment (suspended for five years) for the death of a truck driver after covering up vehicle defects in one of the country's biggest safety scandals. In the United Kingdom in 2007, confectionery producer Cadbury was handed criminal fines totalling £1 million for breaches of food safety legislation that led to the recall of seven products in its chocolate range. In China, severe penalties were handed down in January 2009 after the contaminated baby milk scandal involving misuse of the industrial chemical melamine, including death sentences and life imprisonment for some of those responsible.

The difficulty of the challenge facing managers suddenly tasked with a product safety crisis has been compared by one leading commentator to driving a car backwards at speed with little warning. In most developed countries the days are gone when companies could internalise the information about the known dangers in their organisations and quietly manage the problem with what has been called a 'silent recall' – the removal of existing stocks of defective products. Globalised markets, higher consumer safety expectations and tighter legislation have made the processes of crisis management considerably more transparent. As well as having to deal with notifying government officials, putting the supply chain into reverse, publishing warnings and managing the logistics of restocking and resupplying large numbers of customers there is the public admission of failure to be faced, and the threat of mass tort actions as well as regulatory penalties. Managers can be forgiven for thinking when contemplating recalls that they are damned if they do, and damned if they don't.

Many large companies operating in major economies nevertheless still undertake only the most rudimentary recall planning. Where preparations are made the emphasis is often on damage limitation for the brand and public relations strategies. Communications and government relations consultants have developed specialist units that can assist with these functions. There is no doubt that these are critical considerations, sometimes affecting the very survival of a business. The legal and insurance aspects of recalls are often less well anticipated and understood. The need to obtain experienced legal advice early on in product crises, however, has never been greater. As the following chapters amply demonstrate, there has been a rapid growth in regulatory oversight of product recalls. But at the same time, this has increased the diversity internationally in the laws governing

questions such as when a product defect is deemed to require notification to national authorities, how that information is dealt with, and how prescriptive the procedures are for deciding on and managing the various steps to be taken after the need to address a defect has been identified.

United States

The most highly developed laws in this area are probably those found in the United States, whose Consumer Products Safety Commission (CPSC), which oversees more than 15,000 types of consumer goods, has steadily expanded its enforcement authority since its creation in 1972. In addition to the CPSC, the United States enlists a host of other agencies, including the Food and Drug Administration (FDA), National Highway Traffic Safety Administration (NHTSA) and Bureau of Alcohol, Tobacco, Firearms and Explosives (TSA), to help enforce a myriad of sector-specific product safety laws.

The United States overhauled its consumer protection laws when it passed the Consumer Product Safety Improvement Act of 2008 (CPSIA). Among other things, the CPSIA provided for uniform information in recall notices, enhanced powers for the CPSC to dictate how recalls or other corrective actions will be carried out, and increased penalties for violations. These penalties include significant fines, possible imprisonment and forfeiture of assets, depending on the nature of the violation. The act also now permits the CPSC to share confidential product safety information with foreign governments and agencies.

The CPSIA also mandated the establishment of a public online hazards reporting database (www.saferproducts.gov), which the CPSC launched publicly in March 2011. The database allows consumers to submit reports of safety risks or actual harm, as well as search for information on a variety of products and recalls. The CPSC transmits qualifying reports to manufacturers, who may then respond and provide comments to be posted alongside the reports. While the manufacturing industry has voiced concerns about false or inaccurate reporting, the CPSC insists that the database has safeguards in place to minimise these problems. In its first year, the database received reports from over 6,600 consumers about products ranging from kitchen appliances to footwear to cribs. In 2012, in the first lawsuit of its kind, a federal district court in Maryland sided with a consumer product manufacturer and enjoined the CPSC from publishing a report it deemed to be inaccurate and misleading.

The CPSC continues to aggressively push the limits of its enforcement authority. One recent trend, for example, has been the CPSC's pursuit of legal actions against defunct companies and their former employees. The CPSC has also recently begun mandating that companies seeking to settle CPSC legal actions implement sweeping internal compliance systems to improve regulatory compliance and product hazard reporting.

Europe

In Europe the obligations of manufacturers and others in the supply chain were made clearer and more consistent across the EU member states by important revisions to the General Product Safety Directive taking effect from 2004. To promote traceability, Decision 768/2008/EC positively requires the name and address of manufacturers and importers of products placed on the market in the EU to be indicated on the products themselves, or where that is not possible on packaging or other documentation. Further, additional product safety and market surveillance requirements have been proposed in the European Commission's Product Safety and Market Surveillance Package (February 2013). These proposed revisions

(due to come into force in 2015) are discussed in detail in the European Overview chapter.

The EU's 2013 Annual Report shows how awareness of product safety and market surveillance obligations, which require the notification of unsafe products, has increased considerably since 2004. 2013 witnessed a 4 per cent increase in notifications of unsafe products throughout Europe. There were 2,364 unsafe product notifications in total, of which 1,981 were serious risk notifications. These notifications are those that have been transmitted by the EU to authorities across the 28 member states and details of the products posing a serious risk are published on the RAPEX website. The reason for this recent upward trend in notifications is unclear: it may be that increased numbers of dangerous products are entering the European marketplace; conversely the vigilance efforts by member states may be leading to an increased number of products being detected. It is of note that 64 per cent of total notifications were products of Chinese origin (a 6 per cent increase on 2011). This demonstrates the need for international cooperation and coordination by regulatory authorities.

As from 2008, the European authorities were required to go even further to improve capabilities to meet more consistent minimum standards of market surveillance and enforcement by Regulation (EC) No. 765/2008 (which is part of a package of measures contained in what is known as the New Legislative Framework). The measures include stronger border controls to detect non-compliant products. Aside from consumer protection, one justification given for these measures is levelling the playing field for compliant businesses.

It would appear that the growth in European recalls will continue. As a consequence of this growth, detailed guidelines for the management of RAPEX and member state information-sharing measures were published in Decision 2010/15/EU, including a new risk-assessment methodology for determining the seriousness of product defects and the need for urgent action.

Other regions

While the general trend is towards increased regulatory intervention in developed nations, the pace of change is different in other regions, especially Asia. Japan, for example, has had recall laws for a number of years, but it was only at the end of 2006 that it introduced binding rules for notification of 'serious product accidents' with defective consumer products to its authorities, and authorised the publication of this information by them. This threshold for notification – actual accidents – is much higher than in the United States or Europe, which require there only to be a risk of injury, and only manufacturers and importers are subject to the duty. Japan has, however, increased its authorities' powers to dictate recall measures.

A number of international bodies exist with the objective of increasing the effectiveness of information sharing and joint enforcement, including the OECD's Committee on Consumer Policy (CCP), the International Consumer Product Safety Caucus (ICPSC), the International Consumer Product Safety and Health Organisation (ICPSHO), the Product Safety Enforcement Forum of Europe (PROSAFE) and the Committee on Consumer Policy of the International Standards Organisation (ISO-COPOLCO).

Recalls involving products of Chinese origin continued to increase in 2012 and have led to recognition of the need for international liaison with the authorities in China. The EU, US and Japan have memoranda of understanding with the Administration for Quality, Supervision, Inspection and Quarantine of the People's Republic of China (AQSIQ) for information

sharing and cooperation in addressing problem products. The key issue of traceability of manufacturers of unsafe products in China continues to be a challenge for AQSIQ and the EU authorities. However, cooperation with Chinese authorities and businesses continues to be developed on an EU level, with encouraging results. The 'RAPEX-China' system, which allows for regular and rapid exchange of information between the EU and the Chinese Product Safety Administration has certainly proved beneficial, often preventing unsafe products from being exported to the EU. There are also other bilateral agreements, and protocols such as the US/EU Guidelines for information exchange and on administration cooperation, and AUZSHARE, a computerised database on enforcement matters for Australian and New Zealand authorities.

Global trends

The direction of travel for international policy in this area can be discerned from the conclusions reached at a round-table meeting of regulators, business representatives and other stakeholders from around the world hosted by the OECD in October 2008. This concluded that there is a need for greater inter-governmental coordination and cooperation, harmonisation of product safety standards, a more proactive approach to product safety failures, an increase in resources available to regulators and a rapid international information exchange system to enable countries to notify each other about the presence of unsafe goods in markets. This was developed further by the OECD Working Party on Consumer Product Safety in 2011 when a web portal with a global inventory of product safety issues and events was established. The OECD's Global Recalls portal was launched in October 2012 and pools information on recalls and emergency alerts on a single website. Searches can be carried out for recalls of specific products and specific jurisdictions. Consumers also have the option of reporting a health and safety concern to the relevant regulatory authority, such as the European Commission or the US CPSC.

Currently, a significant international trend vital in the recall context is that of product traceability. In Europe, the PIP scandal added impetus to the EU's proposals for a new regulatory framework for medical devices and in vitro diagnostic medical devices. The proposals will impose more stringent standards, including improved traceability of products. The proposals are expected to be adopted in 2014 and to be implemented gradually between 2015 and 2019. Similarly, traceability features strongly in the proposals set out in the European Commission's Product Safety and Market Surveillance Package, adopted in February 2013. These proposals are currently being considered by the European Parliament and are expected to come into force in 2015. The legislation, if implemented, will see the replacement of the General Product Safety Directive with a new Consumer Product Safety Regulation, including increased requirements on manufacturers and importers relating to labelling products with their country of origin and enhanced obligations regarding contact information for the manufacturer and importer in order to be better able to identify parties throughout the supply chain.

Finally, readers interested in global trends in product safety and recalls and comparisons between national legal and enforcement regimes will find useful information in a study produced for the OECD's CCP entitled 'Analytical Report on Consumer Product Safety' (DSTI/CP(2008)18/FINAL), and another report entitled 'Enhancing Information Sharing on Consumer Product Safety' (DSTI/CP(2010)3/FINAL), both available at www.oecd.org.

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