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PRACTICE TIP

Personal Jurisdiction from Abroad

By Thomas E. Riley and Garrett S. Kamen

Manufacturers based outside the United States often sell goods through a U.S.-based distributor, rather than selling products directly to consumers. Thus, the manufacturer's only connection in the United States may be with a single American distributor, located in a single state, which sells the manufacturer's goods throughout the country. When a consumer is injured and seeks to recover damages from the manufacturer, can the consumer's home state exercise jurisdiction over the manufacturer?

The answer is unsettled, and U.S. courts have adopted divergent analyses on this basic question. Some U.S. courts have exercised jurisdiction over a foreign manufacturer based on its introduction of the product into the "stream of commerce," but others have refused to do so unless the manufacturer is engaged in activity specifically targeted at the forum state. (*See* James Rotondo, "*Daimler AG v. Bauman,*" http://bit.ly/1jbHyQz.) Far from helping to clarify the standards to be applied, the U.S. Supreme Court's decisions have added to this uncertainty, prompting one court to

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CPSC Poised to Change Voluntary Recall Process

Will a More Efficient or a Slower, More Contentious Process Result?

By Cary Silverman

Nearly all recalls of consumer products are "voluntary recalls," meaning that a product manufacturer agrees to conduct the recall, and negotiates how it will be conducted, with the U.S. Consumer Product Safety Commission (CPSC), typically after a potential problem or concern comes to the company's attention. The CPSC is considering changes to this established approach that have significant implications for regulated businesses.

The CPSC has proposed an "interpretive rule" that would standardize voluntary recall notices. 78 Fed. Reg. 69,793 (Nov. 21, 2013). The proposal also makes corrective action plans that implement voluntary recalls legally binding, allows the Commission to mandate adoption of compliance programs as a result of a recall, and would limit a company's ability to avoid a recall being viewed as an admission of a defect in litigation. A 75-day comment period on the proposed rule concluded on Feb. 4.

This article explores the most significant proposed changes and the implications for regulated firms if the CPSC adopts the rule. Firms that make or sell consumer products will need to more carefully consider the potential impact of a recall on their future operations and in product liability lawsuits. Although Commissioners intend the rule to lead to a more efficient recall process, the end result may be a slower, increasingly adversarial, and more expensive process with no significant benefit to consumers.

Current Process for Conducting Voluntary Recalls

For decades, the CPSC has relied on cooperation with businesses to take potentially dangerous products off the market quickly. Businesses, working with the Commission, have conducted more than 1,000 voluntary recalls in the past

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four years alone. While the agency is currently engaged in a rare enforcement action to force a recall of magnetic-ball adult desk toys that have resulted in injuries when ingested by children, it has not conducted a mandatory recall in many years. Rather than lengthy litigation, prompt cooperation has proven to best serve public health and safety.

The recall process often begins with the filing of what is known as a "Section 15(b) report." Section 15(b) of the Consumer Product Safety Act (CPSA) requires companies to notify the Commission "immediately" (within 24 hours with up to 10 days to investigate, if necessary, as interpreted by the CPSC) of receiving information that reasonably supports the conclusion that a product fails to comply with an applicable consumer product safety standard, contains a defect that could create a substantial product hazard, or creates an unreasonable risk of serious injury or death.

The Commission expects firms to submit a report if a reasonable person could conclude, given the information available, that a product creates an unreasonable risk based on the level of exposure of consumers, the nature and severity of the hazard, and the likelihood of harm, as well as the utility of the product. 16 C.F.R. § 1115.6(b). This is often a judgment call. For example, unverified consumer complaints may express concerns or involve injuries that are unrelated to a product's design, do not involve "serious injury," or may result from unreasonable misuse. The company may also question the accuracy of one or two reports of injuries against thousands of product sales and consistent, positive safety test results.

Manufacturers often err on the side of caution in reporting potential safety issues to the CPSC. If the CPSC later finds that the manufacturer failed to file a timely report, it may impose civil penalties of up to a $100,000 penalty per violation, a level that Congress raised from $8,000 in 2008. In 2013, the CPSC entered settlements imposing civil penalties ranging from $400,000 to $3.9 million to resolve allegations that companies knowingly failed to report product defects.

Filing a Section 15(b) report does not automatically mean that the Commission will conclude a recall is necessary. Nevertheless, companies that file a report with the Commission often consider whether to initiate a voluntary recall. Some take advantage of the Commissions "Fast Track" program, an abbreviated 20-day process for negotiating a recall, incentivizing companies to cooperate with the agency without fear of an adverse determination regarding the safety of their products.

In developing a corrective action plan, businesses look to 16 C.F.R. § 1115.20 as well as the CPSC's "Recall Handbook," which provides guidance on reporting obligations, developing a corrective action plan, and communicating recall information to the public. The voluntary recall process involves significant back-and-forth communication between the business and CPSC staff to identify the problem and find reasonable, practical solutions. Upon receiving an executed agreement, the Commission typically accepts it (since it is ordinarily developed jointly with the CPSC), but it also has the option of rejecting it and proceeding with an administrative complaint, or taking other action. 16 C.F.R. § 1115.20(b)(3). If provisionally accepted, the Commission places the agreement on the public record, and announces it in the Commission's public calendar and in the Federal Register, providing any interested person with 15 days to object to the agreement before it

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becomes final. *Id*. § 1115.20(b)(4), (5). The goal of the reporting and recall process is to encourage product sellers to remove potentially unsafe products swiftly from the market.

Proposed Changes to the Voluntary Recall Process

The Commission voted 3-1 on Nov. 13 to move forward with a new rule that will standardize the voluntary recall process. These changes are intended to lead to a more efficient process, but will reduce a company's flexibility in designing an effective recall.

Less Flexibility in Developing And Publicizing Recall Notices

When CPSC staff initially drafted the proposed rule, they expressed their view that an interpretive rule specifying the content that should be included in a voluntary recall notice will result in: 1) greater efficiencies during recall negotiations; 2) greater predictability for the regulated community in working with the agency to develop voluntary recall notice content; and 3) timelier issuance of recall announcements to the public. 78 Fed. Reg. at 69,794. The proposed rule contains a new provision governing "voluntary recall notice principles," which would be codified at 16 C.F.R. § 1115.33. Some of its requirements are consistent with current practice, but others are new.

The proposed rule includes several requirements for the content of voluntary recall notices and how a firm must publicize them. For example:

- The word "recall" must be used in the heading and text, rather than any alternative term. 78 Fed. Reg. at 69,801. Though consistent with the Commission's current practice, some have observed that calling a corrective action plan a "recall" when the action needed to address a potential hazard is far more limited than a refund or replacement, could mislead consumers.
- In describing an alleged substantial product hazard, the notice must state that the hazard "can" occur when there have been injuries or incidents associated with the recalled product. *Id*. at 69,801. "Could," "may," or "potential" should not be used in describing the hazard in such circumstances, according to the proposed rule. *Id*. at 69,797. When viewed in light of a provision limiting disclaimers of admissions of a defect (discussed below), such unequivocal language may not only be inappropriate when there is a small risk of injury, but could adversely affect companies in product liability litigation.
- "Significant retailers" of the recalled product must be named in voluntary recall notices. A significant retailer includes an exclusive retailer, importer, nationwide or regionally located retailer with multiple locations, and those with a significant market presence. The CPSC may require naming other retailers in a recall notice "if identification of the retailer is in the public interest." *See id*. at 69,797-98, 69,801.
- A voluntary recall notice must list the ages and state of residence of any person killed. *Id*. at 69,798, 69,802.
- Firms must send voluntary recall notices directly to each consumer for whom it has contact information or when such information is "reasonably attainable" from third parties, such as retailers. *Id*. at 69,800. Obtaining such information may be difficult in practice and raise privacy issues.
- Voluntary recall announcements must be made using a press release, a prominently displayed in-store poster, and a website posting. In addition to these typical methods, the CPSC would now require at least two additional methods of dissemination, such as Facebook, Google+, Twitter, YouTube, and blogs. If a company uses its website as a means of conveying a voluntary recall notice, then the notice must be prominently placed on the "first entry point" and allow consumers to request a remedy online. *See id*.

The proposed rule also makes clear that the CPSC prefers refunds, repairs, and replacements as remedies in a corrective action plan. Companies that are interested in providing other options to consumers would have the burden of demonstrating that those alternatives will be as effective as the Commission's preferred remedies. *See id*. at 69,795.

Commissioners supporting the proposal view it as increasing efficiency. "What we don't need is every person that has a recall to come in and start from square one," said CPSC Chairman Inez Tenenbaum, who voted to move forward with the proposal before her term ended on Nov.30. Greg Ryan, CPSC Commissioner Skeptical of Voluntary Recall Rule, *Law360*, Sept. 25, 2013. Others, including Nancy Nord, whose term as a CPSC Commissioner concluded in October, recognized that if the CPSC is too rigid in its requirements and lacks flexibility, a recall might not be effective for consumers. *See id*. Nord also expressed concern that the rule was written "in a very absolute sort of way" that would discourage companies from objecting to the agency's preferences during negotiations over a recall notice. *Id*. "Is the effect of issuing this rule to take off the negotiating table the issues that are dealt with in this rule?" Nord asked. *Id*.

Corrective Action Plans Will Become Legally Binding

In addition to the standardizing recall notifications, the proposed rule significantly alters the voluntary recall process in several other significant ways, including by making corrective action plans legally binding.

Current CPSC regulations explicitly provide that corrective action plans are not legally binding. 16 C.F.R. § 1115.20(a). The nonbinding nature of these agreements reflects that companies conduct such recalls

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voluntarily, even where there may not be a defect or risk of serious injury requiring them to do so. The informal nature of such agreements also reduces the need for companies to spend substantial time and resources having lawyers carefully draft and review the language, and engage in lengthy negotiation with the CPSC over the details, when that effort could be better invested in conducting the recall.

While Commission staff did not propose altering this provision in the initial draft of the proposed rule, Commissioner Robert Adler, who now serves as the CPSC's Acting Chairman, proposed an amendment to make such agreements binding. Commissioner Adler viewed the amendment as a "minor tweak" to existing policy that most consumer product makers "will see and yawn and move on with." Commissioner Anne Marie Buerkle, in voting against the amendment, criticized the change as a "momentous shift" that dramatically changes how the agency operates. *See* Greg Ryan, CPSC Proposes Making Voluntary Recall Agreements Binding, *Law360*, Nov. 14, 2013.

The proposed rule states that the Commission has proposed making recall agreements binding due to concerns about "recalcitrant firm[s]" that "have deliberately and unnecessarily delayed the timely implementation of the provisions of their corrective action plans." 78 Fed. Reg. at 69,795. Practitioners, however, including a former CPSC general counsel and chief of staff, say such problems rarely arise. *See* Greg Ryan, CPSC Proposal Risks Delaying Recalls, Alienating Companies, *Law360*, Nov. 15, 2013. The vast majority of firms carry out their obligation in good faith.

While binding agreements might, in exceptional cases, help the CPSC enforce agreements, this change could damage the effectiveness of the voluntary recall process for all consumers. Making recall agreements binding may alter the calculus for a company when deciding whether to offer to conduct a voluntary recall, particularly when the need to do so falls in a gray area. If the proposed rule is approved, preparing corrective action plans will require closer scrutiny and negotiation. Company lawyers will have an obligation to cross every "t" and dot every "i" when drafting the plan. This is not only expensive for businesses, but will slow down the process of getting unsafe products out of the hands of consumers. In addition, entering a binding agreement with the government could adversely impact companies in other ways, such as by triggering obligations to the Securities and Exchange Commission for publicly traded companies or in product liability litigation.

Companies Limited in Disclaiming Admissions

While the CPSC expresses a desire to take certain issues off the table in the negotiating process, making negotiations more efficient, the proposed rule adds a substantial and contentious matter to the voluntary recall discussions: admissions of defect.

Current regulations governing corrective action plans specifically state that "[i]f desired by the subject firm," a company may include the following statement or its equivalent: "The submission of this corrective action plan does not constitute an admission by (the subject firm) that either reportable information or a substantial product hazard exists." 16 C.F.R. § 1115.20(a)(xiii). The regulations make clear that such a language may be included at the option of the company offering to conduct the voluntary recall. Businesses routinely include such language in corrective action plans to ensure that its proactive measures are not misused in court to suggest that the company, in recalling the product, admitted the product was defective.

The Commission proposes striking the phrase, "if desired by the subject firm," and instead permitting such disclaimers only "if agreed to by all parties." 78 Fed. Reg. at 69,795. The Commission suggests that this change "facilitates an opportunity for the Commission to negotiate and agree to appropriate admissions in each particular corrective action plan." *Id*.

Inability to include such a language in a corrective action plan as a matter of right or, worse, the potential for the CPSC to demand inclusion of an admission that a product is dangerous, may give companies pause when considering whether to propose a voluntary recall. If Commission staff exercises its newfound "opportunity … to negotiate" whether such language is included in a corrective action plan or require language that may be viewed as an admission in litigation, such discussions could delay or derail the voluntary recall.

CPSC May Require Compliance Programs

Under the proposed rule, the Commission adds compliance programs to the potential elements of a corrective action plan. The proposed rule provides that such agreements are appropriate under "certain circumstances," and provides factors to guide the Commission. CPSC staff has "broad discretion to seek a voluntary compliance program agreement" under the proposed rule. 78 Fed. Reg. at 69,799 (to be codified at 16 C.F.R. § 1115.20(b)).

It is in a company's interest to have an effective compliance program — one that provides early detection for product safety issues, fulfills reporting requirements and recall obligations, avoids administrative fines and reduces potential civil liability, and maintains positive relationships and a good reputation with consumers, retailers, and the general public. Under the proposed rule, the CPSC may require a company that voluntarily offers to conduct a recall also to adopt a compliance program or supplement an existing program.

The CPSC already considers the rigor of a company's compliance program among its factors for deciding an appropriate civil penalty for a violation of its regulations. *See* 75 Fed. Reg. 15,993, 15,998-16,000 (Mar. 31, 2010) (codified at 16 C.F.R. § 1119.4(b)(1)). More recently, the CPSC has required some manufacturers to adopt compliance controls

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and procedures as part of civil penalty settlements.

When the Commission accepted one such agreement, then-Commissioner Nord shared her concern that "piecemeal creation" of a compliance program mandate "smells of regulatory opportunism disguised as enforcement." She reasoned that the "right way" to impose compliance program requirements is through the notice and comment process, not "backdoor rulemaking." Using recalls to justify imposing mandates unrelated to the problem at issue "risks discouraging companies from participating in the voluntary recall process, as they may feel there is little benefit to doing so." Commissioner Nancy Nord, Statement on the Commission's Decision to Provisionally Accept a Civil Penalty Settlement with Williams-Sonoma, Inc., May 6, 2013.

The Commission could exercise its new authority to require compliance plans as part of any voluntary recall, even when the company reports a hazard in a proper, timely manner. The rule, for example, considers whether a company has conducted multiple previous recalls in a short period of time in demanding a compliance program. *See* 78 Fed. Reg. at 69,799. Such prior recalls, however, may indicate an abundance of caution and diligence resulting from a strong compliance program, not a weak one. Failure of a company to maintain and follow an agreed-upon compliance program would serve as a basis for a CPSC enforcement action and sanctions. *Id*.

The addition of compliance program obligations to the voluntary recall process may discourage responsible manufacturers from proactively conducting recalls to address a potential, but uncertain, safety issues when doing so could result in federal intervention in their internal operations.

Conclusion

Some may ask why the CPSC has prioritized revamping a process that has allowed thousands of recalls to proceed quickly and effectively, benefiting consumers, manufacturers and retailers, and the CPSC for decades. A less "voluntary," voluntary recall process would mark another step away from the Commission's tradition of working closely with the industry to promptly address product safety concerns and move toward a more contentious, litigious process. While the proposed rule is consistent with the CPSC's more aggressive approach since Congress provided it with increased staff and authority in enacting the Consumer Product Safety Improvement Act of 2008, it may not offer the most effective approach to encouraging voluntary recalls.

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comment recently that this "particular theory of personal jurisdiction has been the subject of much debate, and little consensus, throughout the United States, including in the Supreme Court." *Trustees of Boston University v. Everlight Electronics Co., Ltd.*, 2013 WL 2367809 (D. Mass. May 28, 2013).

Minimum Contacts

A court's exercise of personal jurisdiction over a defendant is based on the relationship between the parties, the forum, and the underlying facts surrounding the litigation. In *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), the U.S. Supreme Court recognized that a court can exercise personal jurisdiction over a non-resident defendant only if the defendant has "minimum contacts" with the forum state such that the maintenance of the suit would "not offend traditional notions of fair play and substantial justice."

Following *International Shoe*, the Supreme Court declared that the minimum contacts test required that the defendant "purposefully avails itself of the privilege of conducting activities within the forum State" in order for jurisdiction to attach. *Hanson v. Denckla*, 357 U.S. 235 (1958). Similarly, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court emphasized that a mere "fortuitous circumstance" cannot serve as the basis for a court to exercise jurisdiction over an out-of-state defendant. Thus, the Court said, the minimum contacts test would not be met by the "mere likelihood that a product will find its way into the forum State." But jurisdiction was proper, the Court said, where a corporate defendant delivered its "products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."

Stream of Commerce

While the Supreme Court first introduced the stream of commerce theory in *World-Wide Volkswagen Corp.*, the standard became the subject of focus in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The case involved a Japanese corporation — Asahi — that sold tire valves to a company based in Taiwan. The Taiwanese company incorporated the valves into tires that were sold worldwide. Asahi's only connection to California, the forum state, was that a tire valve it had produced and sold in Taiwan was incorporated into a motorcycle involved in an accident in California.

The Court was divided over whether Asahi's contacts with California were sufficient to meet the minimum contacts standard. Four justices, in an opinion by Justice O'Connor, reasoned that the placement of a product into the stream of commerce, "without more," failed to meet the test. They held that mere "awareness that the stream of

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