IADC Committee Newsletter

PRODUCT LIABILITY

February 2014

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Kara Stubbs reports on the U.S. Consumer Product Safety Commission's proposed interpretive rule regarding voluntary recalls and corrective action plans and the potential significant changes to come.

CPSC's Proposed Interpretive Rule Would Make Significant Changes to Voluntary Recalls

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The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership.
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On November 13, 2013, the U.S. Consumer Product Safety Commission voted to publish in the Federal Register a Notice of Proposed Rule Making regarding Voluntary Recall Notices and Corrective Action Plans. The Commission's stated objective is to better inform consumers, create greater clarity for manufacturers and achieve more effective recalls. The proposed rule was initially focused on the form and content of the recall notice. However, during the November meeting, Commissioner Robert Adler and two other commissioners also approved an amendment that would eliminate a company's option to engage in a voluntary recall without entering into a legally binding agreement and would allow the Commission to seek compliance terms as part of a company's binding corrective action plan. In so doing, the Commission created what has been described as a sea change, departing from nearly forty years of precedent that in the end may result in a more adversarial process that may discourage voluntary recalls.

By way of background, the Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 112 Stat. 3016 (2008)(CPSIA), amended the Consumer Protection Safety Act to strengthen the Commission's authority to recall products and notify the public effectively about a recall's scope and the remedies available. Section 214 of the CPSIA requires the Commission to establish guidelines and requirements for mandatory recall notices, as ordered by the Commission or by a United States District Court. Section 214 also requires that a recall notice include certain specific information unless the Commission determines otherwise. 15 U.S.C. 2064(i). Appreciating that Section 214 does not apply to voluntary recalls, the House Committee expressed its expectation that similar information would be provided, as applicable, in the notices issued in voluntary recalls. H.R. Rep. No. 110-501 at 40(2008)(House Report). Guided by this statement, the Commission believes that whether a product is recalled in the context of a mandatory recall or a voluntary recall, the same goal to advise and encourage affected consumers to take action exists.

The proposed interpretive rule impacts voluntary recalls in four fundamental ways: (1) it proposes to make voluntary corrective action plans legally binding; (2) it limits a company's ability to deny that a reportable issue or substantial defect exists (3) it adds compliance program agreement provisions; and (4) it standardizes voluntary recall notices. Each of these represents real changes to the current practice, and purport to impose additional burdens on companies that desire to voluntarily recall a product. Moreover, the rule ultimately may not afford consumers the most efficient and timely notice of voluntary recalls.

Legally Binding Corrective Action Plans

The current rule defines a corrective action plan as "a document, signed by a subject company, which sets forth the remedial action which the company will voluntarily undertake to protect the public, but which has no legally binding effect." 15 U.S.C. 1115.20(a). Thus, the Commission may not enforce the terms of a corrective action plan should a company violate its terms. The proposed rule would legally bind a company to fulfill the terms of the agreement once it voluntarily agrees to undertake a corrective action plan. This shift would inevitably compromise the speed at which the CPSC can facilitate the removal of potentially dangerous products from the market via cooperation with companies. Faced with a binding agreement and potential litigation absent strict compliance, companies may invest more time in a more detailed

review of the corrective action plans internally and by their lawyers and engage in protracted negotiation with the CPSC, which would serve to slow down the voluntary recall process as a whole. Moreover, in the current environment where companies may be inclined to err on the side of corrective action will be chilled, if their voluntary recall terms are contractual and enforceable in nature and potentially subject to a lawsuit seeking specific performance.

Ability to Deny that a Reportable Issue or Substantial Defect Exists

The proposed rule would afford the Commission additional flexibility concerning admissions in corrective action plans. The phrase "[i]f desired by the subject company" and including the language "if agreed to by all parties" grants the Commission room to seek admissions from the company in each corrective action plan. This change would deprive a company of its right to include a statement in its recall notice to the effect that the submission of a corrective action plan does not constitute an admission that either a reportable issue or substantial defect exists. Such language is adopted to ensure that the action in voluntarily recalling a product does not equate to an admission of product defect that may carry over to the court room. Should the CPSC require such an admission, the number of voluntary recalls would be limited in that companies may forego the voluntary recall process altogether to wait to see if the CPSC will force a mandatory recall. Many companies currently choose to participate in voluntary recalls and opt for voluntary corrective action plans because they are not required to make admissions that might be harmful in subsequent product liability litigation. With the additional flexibility sought in the proposed rule, the CPSC will limit a company's ability to deny that a reportable issue or product hazard exists.

Compliance Programs in Recall Plans

The proposed rule would add compliance program-related requirements as possible components of a corrective action plan. The Commission supports this change because it believes under certain circumstances the addition of a compliance program to a corrective action program has the potential to prevent future safety hazards. In addition, the Commission's intention is to address those companies that lack effective compliance programs and internal controls, while providing notice of the types of circumstances that might trigger the need for such a program. The addition of a compliance program as part of a corrective action plan may have the unintended effect of slowing down the process of notifying the public. It may also deter responsible companies from initiating recalls to address potential, but unconfirmed safety issues potentially related to their product, if it results in the CPSC imposing its compliance program on the company.

Standardized Voluntary Recall Notices

The proposed rule embraces principles that are similar to the guidelines for mandatory recall notices, with some exceptions and identifies information that should be included in voluntary recall notice. For example, the word "recall" must appear in the heading and text. The date the notice was released or published must be provided. A description of the product including model name and number, SKU number and other information needed to describe the product should be identified. 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. The words "could," "may," or "potential" should not be

used in the Hazard Section when there are documented injuries. "Significant retailers" of the recalled product must be named in voluntary recall notices. The notice must state the age and state of residence of any person killed. The rule recognizes that a direct recall notice is the worst effective form of recall notice. The rule expects companies will take reasonable steps to obtain direct consumer contact information from third parties.

The notice should contain a clear and concise statement of the actions the company is taking, the number of units covered by the recall and a description of each remedy available to the consumer. The voluntary recall announcement must be made using a press release or recall alert, a prominently displayed in-store poster and a Web site posting, as well as two additional forms of publication are required. Consistent with consumers embracing social media to communicate a voluntary recall notice, the rule encourages companies to utilize YouTube, Instagram, Vine Video, Facebook, Google+, Twitter, Pinterest, Tumblr, Flickr and blogs, as examples. The rule also addresses Web site recall notices and states that recall notices should be posted on the Web site's first entry point and allow consumers to request a remedy on line. Finally, the notice should contain any other information the Commission deems appropriate.

In conclusion, under the current regulatory framework, nearly all recalls conducted with the CPSC are voluntary. Since January 2010 and the CPSC's promulgation of a final rule for mandatory recall notices, no mandatory recall notices have been announced. In contrast, the CPSC has worked cooperatively with companies on more than 1,000 voluntary corrective action programs and their associated recall notices. Should the proposed interpretive rule be adopted, it is predicted that the number of voluntary corrective action programs will decrease dramatically for many of the reasons discussed herein. In that event, the rule will have the opposite of its intended effect in that consumers would not be better informed and recalls would be less effective.

The comment period for the proposed interpretive rule expired February 4, 2014. It is anticipated that fate of the interpretive rule will be known this summer.

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