

Crisis Control Newsletter

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Crisis Control Newsletter from RQA, Inc.—A Catlin Preferred Provider to Foodservice, Food Processing and Consumer Products Industries

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New Safety Laws May Result in New Liability

Last year saw an explosion of new product safety laws around the world. Australia, South Africa, and Canada have new safety laws in force, most creating safety governmental reporting responsibilities for manufacturers. This will most likely result in more reports to more governments, more potential for fines for late reporting, and increased U.S. and foreign litigation based on product liability and warranty liability theories. In addition, these reports and subsequent corrective actions will most likely also result in more class actions and shareholder lawsuits in the United States and elsewhere.

The thresholds for reporting as established by these new laws are somewhat different, resulting in inconsistent duties for manufacturers selling products in the United States as opposed to selling products internationally. This creates a dilemma when a manufacturer has a duty to report in one or more countries but not in others. In addition, it is possible that corrective actions required or approved by these various government agencies will differ. Lastly, it is likely that plaintiffs' experts will try to use evidence of foreign safety activities, especially after-sale activities, in U.S. lawsuits as the bases for their opinions that the products were defective.

This article will describe the reporting requirements for safety issues involving consumer products in the U.S., Canada and Australia. Part 1 will cover the U.S. Consumer Product Safety Commission. Part 2 will discuss Canada and Australia.

Consumer Product Safety Commission

The most important basis for reporting to the CPSC is section 15(b)(2), which requires reporting if there exists both a defect *and* the possibility of a substantial product hazard. Under section 15(b)(2), a product without a defect is not necessarily subject to the reporting requirements even if injuries occur. Many products are reasonably safe and are not defective and people still get hurt.

To help a company decide whether it has a defect requiring a report, the commission's regulations state that

at a minimum, defect includes the dictionary or commonly accepted meaning of the word. Thus, a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function. A defect, for example, may be the result of a manufacturing or production error; that is, the consumer product as manufactured is not in the form intended by, or fails to perform in accordance with, its design. In addition, the design of and the materials used in a consumer product may also result in a defect.

The next question is whether this "defect" could create a "substantial product hazard." According to the commission,

generally, a product could create a substantial hazard when consumers are exposed to a significant number of units or if the possible injury is serious or is likely to occur. However, because a company ordinarily does not know the extent of public exposure or the likelihood or severity of potential injury when a product defect first comes to its attention, the company should report to the Commission even if it [sic] in doubt as to whether a substantial product hazard exists.

New Safety Laws Continued

According to the commission, there are three factors that a manufacturer must consider in determining if a product may pose a substantial hazard: pattern of defect, number of defective products in commerce, severity of risk, and likelihood of injury. The commission explains these factors as follows:

Pattern of defect. The defect may stem from the design, composition, content, construction, finish, or packaging of a product, or from warnings and/or instructions accompanying the product. The conditions under which the defect manifests itself must also be considered in determining whether the pattern creates a substantial product hazard.

Number of defective products distributed in commerce. A single defective product could be the basis for a substantial product hazard determination if an injury is likely or could be serious. By contrast, defective products posing no risk of serious injury and having little chance of causing even minor injury ordinarily would not be considered to present a substantial product hazard.

Severity of risk. A risk is considered severe if the injury that might occur is serious, and/or if the injury is likely to occur.

Likelihood of injury. The likelihood is determined by considering the number of injuries that have occurred, *or that could occur*, the intended or reasonably foreseeable use or misuse of the product, and the population group (such as children, the elderly, or the disabled) exposed to the product.

The commission encourages manufacturers to file a report even when in doubt about whether it is legally reportable.

A number of years ago, the commission revised its interpretative rule concerning reporting regulations to make it clear that manufacturers and product sellers must consider information generated from sources outside the United States when deciding whether to report. A manufacturer must evaluate information that it obtains, or reasonably should have obtained, about product use, experience, performance, design, or manufacture outside the United States and that is relevant to products sold or distributed in the United States. This applies to manufacturers that sell products outside the United States, and importers, distributors, and retailers that obtain or should have obtained information in a foreign country. This requirement makes it even more important that field experience and reporting responsibilities in each country in which the product is sold be considered at the same time.

*By: Kenneth Ross is a former partner and now Of Counsel in the Minneapolis office of Bowman and Brooke LLP

Food and Drug Administration Recalls (www.fda.gov)

Product: Hard-Cooked Eggs Packed in Brine
Incident: Possible Health Risk–*Listeria monocytogenes*

A Minnetonka, MN firm is recalling specific lot dates of hard-cooked eggs in brine sold in 10 and 25 lb pails for institutional use. The eggs were produced at a Wakefield, NE facility and have the potential to be contaminated with *Listeria monocytogenes*. *Listeria monocytogenes* can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems. The recalled eggs were purchased by food distributors and manufacturers located in 34 states and are labeled under six brand names. None of the eggs were sold directly by the firm to retailers or consumers, but may have been used in products sold to retail outlets or used in foodservice settings. To date, no illnesses related to this recall have been reported. The recall was initiated after lab testing revealed that some of the eggs may have been contaminated. Anyone with questions should contact the company directly.

Product: Sandwich Bars
Incident: Possible Health Risk–*Undeclared Allergen*

An Emeryville, CA firm is voluntarily recalling 8,150 units of their 5-count cartons of strawberry jam and peanut butter snack size sandwich bars due to a mislabeled inner wrapper. People who have an allergy or severe sensitivity to peanuts (or peanut butter) run the risk of serious or life-threatening allergic reaction if they consume these individual bars. While cartons of these sandwich bars are correctly labeled, some of the individual bars are incorrectly packaged in a wrapper for honey graham and strawberry yogurt which bears an ingredient statement for that particular product. Consumers who are allergic to peanut products should not use these products. No illnesses have been reported in connection with this recall. The sandwich bars were sold online and in retail stores nationwide. Consumers who have purchased these products should return it to the place of purchase for a full refund. Consumers with further questions should contact the company for more details.

United States Department of Agriculture Recalls (www.usda.gov)

Product: Cobb Salad Products
Incident: Possible Health Risk–*Listeria monocytogenes*

A Houston, TX establishment has recalled approximately 515 pounds of cobb salad products sold in 7.5 oz plastic containers. The salads contain eggs that are the subject of a Food and Drug Administration (FDA) recall due to concerns about contamination with *Listeria monocytogenes*. *Listeria monocytogenes* can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems. So far, FSIS has not received any consumer complaints or reports of illness. The problem was discovered when the firm was notified by one of its suppliers that the hard-cooked eggs tested positive for *Listeria monocytogenes*. The recalled cobb salads contain the recalled eggs and are the subject of this FSIS recall. Consumers and media with questions should contact the company directly.

Product: Chicken Salad Products
Incident: Possible Health Risk–*Listeria monocytogenes*

A Bear Creek, NC establishment is recalling approximately 1,200 pounds of chicken salad products sold in 30 lb boxes. The products contain eggs that are the subject of a Food and Drug Administration (FDA) recall of eggs due to concerns about contamination with *Listeria monocytogenes. Listeria monocytogenes* can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems. The products were sent to a distributor in South Carolina for further distribution to retail establishments in North and South Carolina. The chicken salad products may have been repackaged as sandwiches under a different brand. The recalled chicken salad products contain the recalled eggs and are the subject of this FSIS recall. So far, there have not been any reports of illness. Please contact the company with any further questions.

Consumer Product Safety Commission Recalls (www.cpsc.gov)

Product: Fax Machines
Incident: Hazard– *Fire & Burn*

A Palo Alto, CA importer is voluntarily recalling about 928,000 fax machines (240,000 in Canada and Mexico). The fax machines are dark gray and measure about 11 in. high and 14.5 in. wide. The two recalled models involved in the recall can overheat due to an internal electrical component failure, posing fire and burn hazards. The fax machines were manufactured in China and sold at electronics, computer and camera stores nationwide and online from Nov. 2004 through Dec. 2011. The importer is aware of seven reports of fax machines overheating and catching fire, resulting in property damage and one instance of a minor burn injury to a consumer. Consumers should immediately stop using the recalled fax machines, disconnect them from the electrical outlet and contact the company for a rebate on the purchase of an authorized replacement fax machine. For more information, consumers are asked to contact the company.

Product: Single-Cup Coffee Makers
Incident: Hazard-*Burn and Laceration*

An Irvine, CA manufacturer in cooperation with the CPSC and Health Canada is recalling approximately 835,000 units (900,000 units in Canada) of single-cup brewers. The brewers use plastic discs that are filled with coffee or tea to brew hot drinks. The plastic disc that holds the coffee or tea can burst and spray hot liquid and coffee grounds or tea leaves onto consumers using the brewer and onto bystanders, posing a burn hazard. The coffee/tea makers were manufactured in Slovenia and China and were sold from June 2008 through Feb. 2012. They were sold at department, mass merchandise and home improvement stores nationwide as well as on various websites. There have been 140 reports of incidents with the brewers spraying hot liquid, coffee grounds or tea leaves onto consumers, including 37 reports of second-degree burn injuries. For more details, contact the company directly.

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