


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

September 2013
Volume U0913 Issue 1

## Product Liability and Regulatory Compliance

Product liability litigation and regulatory activities often become intertwined. Product liability claims and lawsuits can generate reports to the government and recalls. And, on the flip side, recalls can generate product liability and other lawsuits and contribute to findings of liability.

Reporting a safety issue to the government and undertaking a recall can certainly make defending a product liability case much harder. And, while it doesn't amount to absolute liability, reporting and recalling certainly increases the interest of plaintiff's attorneys and can serve as the basis for a plaintiff's verdict and possible award of punitive damages.

The increased risk of being sued in product liability and increased need to report to U.S. and foreign government agencies has made product safety regulatory compliance a very complex and risky global task.

Of course, undertaking a recall can generate more litigation. Deserving and undeserving plaintiffs who may have been injured by a particular product are much more likely to sue if there has been a recall of that product. And, defending such cases can be difficult, although not impossible. Plaintiff should be required to prove that the injury was caused by that aspect of the product that caused the recall before they could get testimony admitted on the recall. Also, it is possible that the judge will rule that the recall is a "subsequent remedial measure" and therefore not admissible to prove a defect.

And, the manufacturer can retain an expert to defend the adequacy of the recall so, in the event it gets into evidence, they have something to say. The question of recall adequacy is based on negligence and therefore the plaintiff must first show that the manufacturer could have done a better job. However, they then need to prove that if the manufacturer did a better job, that the plaintiff's product would have been recalled and the accident would not have happened. That may be hard to do.

It is very easy to argue that more could be done in a recall. And virtually all recalls are only modestly effective. Therefore, manufacturers rightly worry about a jury ruling that their recall was inadequate.

The interrelationship between litigation and regulatory activities is very complex and important. To minimize the risk, it is a good idea to seek assistance from lawyers who have expertise in both product liability and regulatory compliance.

Of course, a manufacturer cannot let its defensive posture in litigation cloud its judgment in deciding what to do. What is best for future safety may be to report to the government and implement a recall, even though the product can be successfully defended in product liability litigation.

For more on this topic visit: productliabilityprevention.com

*Source: Kenneth Ross, esq. Of Counsel Bowman and Brooke LLP*

## Recall Case Studies—Legal Impact

**XL Foods 2012 - E.coli in beef products**
(Foodqualitynews.com, 10/2012)

- The CFIA suspended the Alberta's plant operating license (1 month)
- C$17 million Class Action Lawsuit launched (CBC News, 2/15/13)

**Peanut Corporation of America 2008 - Salmonella in peanut butter paste and peanuts**

- The U.S. Justice Department launched a criminal investigation for possible prosecution under provisions of the Federal Food, Drug, and Cosmetic Act.
- The FBI announced that it had joined the criminal investigation of the company.
- Bankruptcy judge ordered PCA's insurance carrier to set aside $12 million to reimburse victims for health issues related to the recalled products

**Maple Leaf Foods 2008 - Listeria monocytogenes in cold cuts**

- Paid victims of outbreak $27MM from class action law suits

**Menu Foods 2007 - Melamine contamination in pet food**

- Class action lawsuit against Menu Foods for $100million on behalf of all affected pet owners
- 2 Chinese companies were indicted -
  - 13 felony counts - introducing adulterated food into interstate commerce.
  - 13 felony counts - introducing misbranded food into interstate commerce.
- 1 US company was indicted -
  - 13 misdemeanor counts of introducing adulterated food into interstate commerce.
  - 13 misdemeanor counts of introducing misbranded food into interstate commerce.

**Topps Meat Co. 2007 - E.Coli contaminated meat**

- At least one lawsuit to recoup medical expenses
- The company and a number of retailers have also been hit with a class action suit.

**Odwalla 1996 - E.coli contamination from apples contaminated through feces from cows grazing in a nearby pasture.**

- Criminal fine of $1.5 million
- 20 personal injury lawsuits

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

**Product:** Cantaloupes
**Incident:** Possible Health Risk–*Listeria monocytogenes*

A Grand Rapids, MI firm is recalling approximately 5,400 cantaloupes because of a possible health risk to consumers. The produce, which was distributed to small, independent grocers in Michigan July 23-26, has the potential to be contaminated with *Listeria monocytogenes* and should be discarded and not consumed. The company has not received any reports of illnesses related to these products and no other products have been affected. The firm became aware of this issue after the Food & Drug Administration conducted a routine sampling and found the cantaloupes contained the bacteria. After receiving notice from the FDA, the firm immediately alerted retailers and requested that they remove the produce from their shelves. The firm has also contacted the supplier of the cantaloupes. The source of the potential issue is still under investigation. Consumers with questions should contact the company directly for more information.

**Product:** Cilantro
**Incident:** Possible Health Risk– *Listeria monocytogenes*

A Willard, OH firm is voluntarily recalling 465 boxes of Cilantro due to possible *Listeria monocytogenes* contamination, an organism which can cause serious and sometimes fatal infections in young children, frail or elderly people, and others with weakened immune systems. There has not been any cases of illness reported. The Cilantro was sold to distributors in Michigan on August 3, 2013. The product was also shipped to retail stores in IL, IN, MI and OH. Consumers who may have purchased this product should return or dispose of it. The firm became aware of this issue after the Michigan Department of Agriculture conducted a routine test on a sample obtained at a retailer and found that sample contained the bacteria. The firm alerted the retailer and wholesaler and requested they remove the produce from their shelves. The source of the contamination is still under investigation. The firm has not been able to find any other evidence of contamination within their supply chain.

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

**Product:** Boneless Veal Products
**Incident:** Possible Health Risk–*E. Coli Contamination*

A New York Mills, NY firm is recalling approximately 12,600 pounds of boneless veal products because they may be contaminated with *E. coli* O157:H7, *E. coli* O145 and *E. coli* O45. The products subject to recall include 60-lb. boxes of boneless veal and were produced on June 17, 18, 24, 28 and 29, 2013. The products were then distributed to wholesalers in New York and California for further processing. FSIS became aware of the problem during inspection program personnel review. The firm sampled the product per their food safety program, and inadvertently shipped the product into commerce. FSIS and the company have received no reports of illnesses associated with consumption of these products. Consumers and media with questions regarding the recall should contact the company directly.

**Product:** Beef Products (July 2013)
**Incident:** Possible Health Risk–E. Coli Contamination

A Liberal, KS., firm, is recalling approximately 50,100 pounds of ground beef products that may be contaminated with *E. coli* O157:H7. The products were produced on July 18, 2013 and were shipped in 40 to 60 pound cases to retailers, wholesalers, and food service distributors nationwide. The problem was discovered through routine FSIS monitoring which confirmed a positive result for *E. coli* O157:H7. An investigation determined the firm was the sole supplier of the source materials used to produce the positive product. FSIS and the company have received no reports of illnesses associated with consumption of these products. Consumers and media with questions regarding the recall should contact the company directly or visit the company's website for more information.

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

**Product:** Coffeemaker
**Incident:** Possible Risk-*Injury Hazard*

A Miramar, FL distributor is recalling approximately 641 units of under-the-cabinet coffeemakers manufactured in China and sold in hardware stores from July 2008-June 2013. The coffeemakers were available in either white or black. The 12-cup coffee pots are glass with a molded handle the same color as the machine and a silver metallic bracket running around the glass near the bottom. The same model number was previously recalled with another eight models in 2012. After the recall announcement, an additional 641 units continued to be sold. The coffee pot handle can break, causing cuts and burns to the consumer. The firm has received more than 1,607 reports of handles breaking, including more than 83 reports of burns and/or cuts. Consumers should immediately stop using the coffeemakers and contact the firm for a full refund.

**Product:** Patio Bistro Gas Grill
**Incident:** Possible Risk-*Burn Hazard*

A Columbus, GA importer is recalling approximately 69,300 units of patio bistro gas grills (1,900 units in Canada) manufactured in China and sold at hardware stores and other retailers nationwide and online from Sept. 2010-June 2013. The recall involves two models that are both single-burner propane gas grills equipped with a battery-operated integrated electronic ignition and intended only for outdoor use. The grills have round black bodies with silver/aluminum trim. The electronic ignition on the grill can ignite unexpectedly, posing a burn hazard. The firm has received 26 reports of the burner flame going out and then unexpectedly reigniting when the consumer turned the control knob to "OFF." Consumers should immediately stop using the grills and contact the company for instructions on how to order and install a free repair kit.

*Crisis Control is a newsletter jointly published by RQA, Inc. & Catlin Group.*

For more information about these topics and more, please contact:

**Carol Kozlowski, CPIM**
Manager of Crisis Management, RQA, Inc.
**Phone:** 708-364-7060 x129
**Email:** c.kozlowski@rqa-inc.com

RQA-Inc.com

**London, UK:**
**David Burke:** david.burke@catlin.com
**Ian Bailey:** ian.bailey@catlin.com
**John Naughton:** john.naughton@catlin.com
**Email:** CrisisManagement@catlin.com

Catlin.com