

Crisis Control Newsletter

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

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Recall Adequacy

As we all know, recalls can be the most costly and damaging event in any manufacturer's corporate experience. Not only do they cost a great deal to implement and resolve, but they can generate many new product liability cases and make all of them harder to defend. In addition, they might even generate class-action lawsuits which can cost many millions of dollars to resolve.

An example of how expansive the problem with recalls can be is a class action lawsuit in California where a plaintiff claims that a grocer's failure to use its customer loyalty program to warn consumers about recalled food constitutes an unfair and deceptive act and a failure to warn. See *Hensley-Maclean v. Safeway, Inc*., (U.S. Dist. Ct., N.D. Cal., SF Div..

In addition, the increase in recalls has also created problems. Recalls have become so numerous that there is a new phenomenon called "recall fatigue" that threatens to make relatively ineffective recalls even more ineffective. This makes it harder to defend the recall to the government and in a product liability case.

Despite this, manufacturers and retailers are striving to create new ways to make recalls less costly and more effective. For example, one club store uses the data gathered through cards carried by its millions of wholesale club members and calls them within 24 hours if they have purchased a recalled item. The company then follows up with a letter. This results in the vast majority of recalled products being returned to the store. See ***"Officials worry about consumers lost among the recalls,"*** Washington Post, July 1, 2010.

Since recall adequacy is based on negligence, the jury gets to decide whether the manufacturer could have done more. Adopting the best practices that have been issued by government agencies and standards groups and utilized by other manufacturers is very difficult to do. In addition, when defending the adequacy of a recall, considering the "best practices" employed or suggested by others can be helpful in arguing that you did a non-negligent job of recall. While relying on the government's regulations and guidelines and approval of your recall will not provide a certain legal defense to a claim of negligent recall, it can be helpful in bolstering an argument that you did all that was necessary.

Further information is available about new developments in the standards and international areas as well as several studies released by the U.S. federal government on how to improve product recalls. These include GS1 and ISO 10393 standards.

Recall Standards Guidance

GS1 Product Recall Standard

The GS1 product recall standard and accompanying multi-jurisdictional implementation guide was ratified and published in June 2012. It took 4 years of standards developments efforts and inputs from over 30 countries. The GS1 product recall standard is a common-sense blueprint enabling all supply chain stakeholders to execute more effective product recall processes and notifications. The standard defines, standardizes and harmonizes the critical attributes that need to be identified, captured and shared among trading parties and regulators during the food recall alerting and messaging process.

ISO Standard on Recalls

ISO 10393, the Consumer Product Recall, Guidelines for Suppliers, was published in 2013. The GS1 product recall standard is designed to provide practical guidance for suppliers to determine whether they need to carry out corrective actions.

If a food recall is necessary, the guidance provides information and tools that suppliers of all sizes can use to develop a documented and validated food recall program that will help implement timely and cost-effective recalls, minimize legal and reputation risks, and reduce health or safety risks to consumers

In the standard, there are extensive suggestions on how to develop a recall strategy, recall objectives and recall process as well as how to develop a communication plan. Therefore these suggestions should be considered as a company develops a recall program. This is critical as a lack of preparation will always result in a potentially inadequate recall and may pose health and safety risks to consumers. A product recall standard for food is the best protection.

The company should strive to meet or exceed the requirements and good suggestions made by these various entities.

When manufacturers who sell globally recall their products, it is important that they be successful in all countries, not just the U.S. Inadequate recalls in other countries can have an adverse effect on U.S. products liability litigation. It could even trigger further follow-up recall efforts required by the U.S. government agency. Therefore, best practices being developed anywhere in the world are appropriate to consider adopting.

By: Kenneth Ross, *former partner and now Of Counsel in the Minneapolis, Minnesota office of Bowman and Brooke LLP*
Additional Sources: productliabilityprevention.com
GFSR

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

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

A Maspeth, NY firm is recalling its 2 and 4 ounce packages of pan fried anchovies sold in clear plastic packages due to contamination with *Listeria monocytogenes*, an organism which can cause serious and sometimes fatal infections in young children, frail or elderly people and others with weakened immune systems. The recalled product was distributed nationwide in retail stores and through mail orders. An alleged illness has been reported to date in connection with this problem. The recall was initiated after routine sampling by The Virginia Department of Agriculture and Consumer Services Food Inspectors and subsequent analysis of the product by Food Laboratory personnel revealed the presence of *Listeria monocytogenes*. Customers that have purchased the anchovies are urged to return them to the place of purchase for a full refund. Consumers with questions should contact the company.

Product: Pumpkin Seed Pesto
Incident: Possible Health Risk–*Clostridium botulinum*

A Sutter, CA firm is voluntarily recalling pumpkin seed pesto because of irregular lab results. The company found that the jarred pesto may have been improperly processed, making it susceptible to contamination with *Clostridium botulinum*. The food product was distributed nationwide under a retailer's label since September 2014 and is sold in 8 ounce glass jars. The company made the decision to recall this product as a precautionary measure to ensure the safety of their customers. The company has not been notified of any illnesses associated with this product. Ingestion of botulism toxin may lead to serious illness and death. Consumers are warned not to use the product even if it does not look or smell spoiled. Consumers who have purchased the recalled pesto are urged to dispose of the product or return it to the place of purchase for a refund. Consumers should contact the company with any questions.

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

Product: Lamb Products
Incident: Possible Health Risk–*Non-Inspection*

A Frederick, MD establishment is recalling approximately 27,948 pounds of raw lamb products because they were not presented at the border for USDA-FSIS Import Inspection. Without the benefit of full inspection, a possibility of adverse health consequences exists. The lamb products were packaged on October 21, 2013, September 2, 20, 21 and 22, 2014. The products were shipped to retail establishments in Washington and Oregon where the products would have been repackaged. The problem was discovered during a routine review using the Automated Commercial Environment (ACE) database. The failure to present was the result of the importing establishment not following appropriate procedures. FSIS and the company have not received any reports of illness or adverse reactions due to consumption of these products. FSIS issues a recall for imported product when the product is not presented for inspection at the U.S. border.

Product: Meat and Poultry Products
Incident: Possible Health Risk–*Listeria Monocytogenes*

A Burnsville, MN establishment is recalling approximately 62,488 pounds of meat and poultry products due to possible contamination with *Listeria monocytogenes*. The meat and poultry breakfast products were produced on various dates from July 16, 2014 through September 25, 2014, and then shipped to distributors, retailers and airlines nationwide. The problem was discovered when a FSIS product sample confirmed positive for *Listeria monocytogens*. The tested product was held and the recalling firm tested raw materials from the product and found that the roasted red skin potatoes, which were provided by an independent supplier, tested positive for *Listeria monocytogenes*. The firm is recalling all products that used the confirmed positive potatoes. So far, there have been no reports of illnesses associated with the consumption of these products. Media and consumers with questions should contact the company.

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

Product: Lopper Shears
Incident: Possible Risk-Injury & *Laceration Hazard*

A Madison, WI distributor is recalling approximately 277,000 units of lopper shears (11,00 units in Canada). The sheers have 32 inch dark orange steel handles and black rubber grips with a gray strip. Plastic gears connected to the pruning blades allow the consumers to open and close the pruning blades by moving the handles. The lopper handles can break when attempting to cut branches, posing a risk of serious injury and laceration. The company has received 11 reports of incidents involving the lopper handles breaking, including reports of bruising and lacerations, some requiring stitches to the head and face. The shears were manufactured in China and sold at a retailer nationwide and online from May 2011 through June 2014. Consumers should immediately stop using the recalled lopper shears and contact the company to receive a replacement lopper. Consumers with questions should contact the company.

Product: Toy Toaster Sets
Incident: Possible Risk-*Injury Hazard*

A Wayne, NJ importer is recalling approximately 30,000 units of toy toaster sets (6,000 units in Canada). The teal blue plastic toy toaster has silver trim around the slice opening on top, with an orange slider handle on the side and orange 3 -dimensional adjustment knob outlined with orange dots in a half moon shape on the face of the toaster in the bottom corner. The toaster set was sold with two plastic toast slices and two plastic half bagel slice accessories. The plastic toast, under pressure, can crack and break into small pieces creating sharp edges and pose a choking hazard. The company has not received any reports of incidents or injuries. The toy toaster sets were manufactured in China and sold at a retailer nationwide and online from July 2013 through August 2014. Consumers should immediately take away this product from children and return it to the retailer to receive a free refund.

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

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