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CIVIL PENALTIES**CONSUMER PRODUCT SAFETY COMMISSION**

A recent ruling by a federal district court in *United States v. Spectrum Brands*, finding Spectrum liable for failing to timely report to the Consumer Product Safety Commission possible safety risks posed by coffeemakers, offers important lessons for CPSC-regulated companies, Stephanie Tsacoumis, the agency's immediate past General Counsel, says. Among the key lessons: follow-up on reports of harm; when in doubt, report; and report comprehensively, the author says.

**When in Doubt, Report: Coffee Pot Ruling
Underscores Need for Robust CPSC Reporting Practices**

BY STEPHANIE TSACOUMIS

Companies that manufacture, distribute or sell consumer products should heed the lessons of a recent, emphatic federal district court opinion addressing Consumer Product Safety Act (“CPSA”) reporting obligations. In *United States v. Spectrum Brands, Inc.*, No. 15-cv-371-wmc (W.D. Wisc. Nov. 17, 2016), the court found that Spectrum Brands, Inc., the acquirer of the company that distributed Black &

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Decker coffeemakers, was liable for failing to timely report to the Consumer Product Safety Commission (“CPSC”) the possible risks posed by the coffeemakers, which broke, burning dozens of consumers.

In reaching its conclusion, the court emphasized the broad scope of the reporting obligations of section 15 of the CPSCA and outlined the conditions necessary to establish a valid “safe harbor” from liability. In addition, the court identified several significant deficiencies in Spectrum’s processes and procedures.

CPSC Authority Confirmed

The court also re-affirmed the CPSC’s authority to pursue civil penalties for failure to report as required by section 15. Spectrum argued that CPSCA’s reporting requirements violate the due process right to fair notice, and that the agency’s decision to seek a civil penalty was arbitrary and capricious. The court characterized both arguments as “border[ing] on the frivolous.” The court stated: “Contrary to [Spectrum’s] caricature, the CPSCA and interpretive regulations establish an enforceable standard” The “obvious” response to Spectrum’s complaint about the scope of the section 15 reporting obligation, according to the court, is “when in doubt, report,” echoing long-conveyed advice from CPSC staff to regulated entities.

Gabelli Statute of Limitations Argument Rejected

Additionally, the court rejected Spectrum's statute of limitations argument predicated on *Gabelli v. SEC*, 568 U.S. ___, 133 S. Ct. 1216 (2013). Agreeing with similar holdings in prior precedents, the court found that because section 15 reporting obligations are "continuing," the statute of limitations does not begin to run when the company first fails to report, as argued by Spectrum. Rather, the five-year statute of limitations period begins when the company actually reports or gains actual knowledge that the government is adequately informed with all of the information possessed by the company.

Reporting Procedures Should Be Strengthened

Companies that wish to avoid CPSA liability should incorporate into their compliance programs and procedures the requirements of section 15 as articulated in the *Spectrum* opinion. In addition, regulated entities should ensure that company procedures and internal controls address the deficiencies noted by the court.

The coffeemakers at issue were distributed and sold from 2008 to 2012. During that time U.S. consumers conveyed to the distributor approximately 1,600 reports that the coffee carafes were suddenly cracking, separating and breaking at the handle. Nearly 70 of these reports noted a related burn or laceration.

In response to the complaints, engineers changed the design of the coffeemaker carafes. Complaints continued, however. Ultimately, Spectrum voluntarily recalled the coffeemakers without advising the CPSC. A month later, Spectrum filed a section 15 report to the CPSC.

Although consumers also had submitted reports of the coffeemaker problems to the CPSC, the agency lacked knowledge of the full extent and nature of the complaints made directly to the company. As noted by the court, Spectrum:

knew of over a thousand more failures and dozens more injuries than did the CPSC. Even at the time Spectrum finally filed its section 15 report . . . , the CPSC was still not told that [Spectrum] had changed the design of the carafes . . . in an attempt to remedy the defect, nor that Spectrum has voluntarily recalled the carafes . . . !

[emphasis in original]

Reporting May Be Triggered Without Actual, Serious Injuries

The *Spectrum* ruling has significant implications for company review and evaluation of consumer complaints about products. Specifically, consumer reports of products that present a substantial hazard or risk of serious injury should be carefully reviewed for CPSA consequences even if no serious injury appears to have occurred. Widespread exposure to potentially defective products or potential serious injury can trigger a reporting obligation.

Under section 15 of the CPSA, companies must report to the CPSC certain information about products that:

- contain a defect which could create a substantial product hazard, or

- create an unreasonable risk of serious injury or death.

In defending its delay in reporting, Spectrum stressed that the reported injuries were not serious. Responding, the court stated that awareness of an "actual serious injury" is not required to trigger a reporting obligation. Instead, referencing the plain language of the statute, the court concluded that an awareness of a substantial hazard or risk of serious injury triggers reporting.

Further, the court noted that the injury need not be "serious." As reflecting in applicable regulations, the existence of any one factor — pattern of defect, number of defective products distributed in commerce, severity of risk — could create a substantial product hazard that requires a report to the CPSC. Thus, as the *Spectrum* opinion states: "a significant degree of exposure of the possibly defective product to the public, or the likelihood that it will cause injury, can give rise to a substantial product hazard regardless of whether there is a risk of a serious injury."

As a result, company procedures and internal controls should call for escalation and careful analysis of reports or complaints involving injuries. Moreover, section 15 reporting should be affirmatively considered when the company "first appreciate[s] that [the] product may contain a defect that could injure people, even when the risk of serious injury is in doubt."

Companies Should Conduct Diligence on Complaints

The *Spectrum* ruling also suggests that companies should follow up on reported injuries or near-injuries to ascertain potential risks. The court suggests that in some instances "an independent survey" may be prudent.

Spectrum asserted that the carafes posed no risk of serious injury. The court was skeptical, however, specifically noting the lack of any evidence "that Spectrum ever followed up on the complaints or injuries to verify their severity, [or] that it made any independent survey to determine if other catastrophic failures were occurring without complaint."

The court characterized "Spectrum's proclaimed confidence that no risk of serious injury was presented by the carafe failures" as "overly optimistic, at best, and the result of Spectrum burying its head in the proverbial sand . . . at worst." Regulated entities therefore should examine carefully consumer reports of injuries or "close calls." Factual follow-up and further inquiries may be called for. Moreover, keeping in mind the court's admonition to report "when in doubt," reporting procedures should be initiated when patterns or trends manifest.

Section 15 Reports Should Be Comprehensive

A company's section 15 obligation is discharged once the company has "actual knowledge that the [CPSC] has been adequately informed." In addressing this "safe harbor" provision, the *Spectrum* court concurred with prior precedent, finding that the safe harbor requires "overlapping" knowledge. According to the court, whether the CPSC is "adequately informed" depends not only on the degree of the agency's knowledge

about the product defect and associated injuries, but also on the extent to which the CPSC's knowledge overlaps with the company's knowledge.

A company that discloses "the full extent of its knowledge with respect to the possible defect, the number of suspected failures, and the range of injuries experienced" would satisfy the safe harbor requirements. If the reporting company fails to convey to the CPSC the totality of the company's information, the safe harbor from reporting will not be available. Having failed to inform the CPSC of all of the carafe failures and injuries of which the company was aware or of the design

change or its own "silent recall," Spectrum could not rely on CPSC's knowledge as a defense to reporting.

To summarize the lessons of the *Spectrum* case for CPSC-regulated companies:

- follow up on reported injuries or near-injuries;
- "when in doubt, report" (even if no serious injuries have been reported); and
- report comprehensively, including all information about a potential defect, potentially related reports and injuries, and related company actions such as remedial design changes and "silent recalls."