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CPSC Civil Penalties: A Divide Along Party Lines

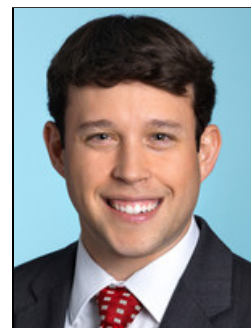
Law360, New York (June 14, 2016, 1:23 PM ET) -- This past March, while speaking at a Consumer Federation of America luncheon, U.S. Consumer Product Safety Commission Chairman Elliot Kaye stated that he "was pleased to announce" that the agency had secured a \$15.45 million civil penalty. Commissioner Joe Mohorovic, who voted in favor of the penalty, issued a statement expressing reservations that "too few of the compelling facts" were reflected in the public facing settlement documents for the regulated community to draw conclusions and lessons.

He has since issued two strongly worded dissents raising concerns about the overall transparency of the civil penalty demand process. Commissioner Ann Marie Buerkle has recently stated that "consumers will be safer if we help companies prevent violations rather than celebrate marquee penalties," while Commissioner Marietta Robinson has defended the CPSC's approach to civil penalties against such criticisms calling them "unwarranted" and "misguided."

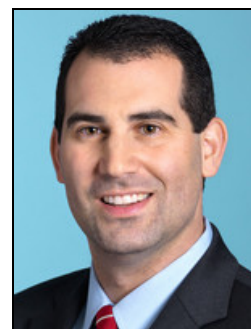
These four perspectives represent some of the dueling philosophies within the CPSC leadership about the role and purpose of civil penalties. The differences of opinion as to the commission's approach to civil penalties have never been more pronounced. Over the past two weeks, the CPSC announced civil penalty settlement agreements with Teavana Corporation and Sunbeam Products (d/b/a Jarden Consumer Solutions) for \$3.75 million and \$4.5 million, respectively. These recent penalties come on the heels of the CPSC's obtainment in March of the record-breaking \$15.45 million civil penalty referred to above against various Gree Electric Appliances entities.

It is no secret that over the past two years the CPSC has sought higher civil penalties against companies for alleged violations of the requirement to report product safety issues to the agency in a timely manner — and has notably achieved that goal as announced penalties creep higher and higher into the millions of dollars. However, in pursuing such civil penalties, the commission's approach has increasingly divided along partisan lines.

Since last May, the commission has accepted nine civil penalty settlement agreements presented to it by the agency's professional staff that ranged from \$2 million to \$15.45 million. Five of those penalties received a 4-1 vote with Commissioner Buerkle dissenting, while four penalties received a 3-2 vote with Commissioners Mohorovic and Buerkle dissenting.



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Approach of the Chairman and Commission's Democratic Majority

Chairman Elliot Kaye

Last year, CPSC Chairman Elliot Kaye made waves in the product safety world when he remarked at the 2015 annual International Consumer Product Health and Safety Organization product safety conference that he was directing staff to seek significantly higher civil penalties against companies for violations of the CPSC's product safety statutes. Chairman Kaye doubled down — literally — on

those remarks earlier this year when, at the same conference, he stated that he wanted to see “double digit” civil penalties based on certain fact patterns that he was seeing. Kaye reasoned that Congress had intended such increases when it significantly raised the civil penalty ceiling in the Consumer Product Safety Improvement Act of 2008 (CPSIA) from \$1.825 million to \$15 million. A few weeks later, Chairman Kaye announced the \$15.45 million civil penalty against the Gree entities.

Most recently, after the CPSC announced the Teavana civil penalty, Chairman Kaye made the following remarks regarding Section 15(b) reporting obligations and civil penalties:

All companies who do business before the CPSC must understand that they cannot withhold information from the commission that impacts public safety. If consumers are suffering product-associated cuts by broken glass and burns by hot liquid then that type of information needs to be reported to the CPSC — immediately. The \$3.75 million penalty agreed to by Teavana is appropriate and is another sign that the CPSC will consistently hold companies accountable when they do not comply with the law ...

In short, it is evident from his remarks that Chairman Kaye believes that companies have a heightened duty to report potential defects to the commission, intends to pursue higher civil penalties against companies who violate their obligations and responsibilities under the product safety laws, and supports the general process and procedures currently followed by the commission and its staff in prosecuting civil penalty demands.

Commissioner Marietta Robinson

One of Chairman Kaye’s Democratic colleagues, Marietta Robinson, has supported the commission’s general approach to civil penalties and has voted in favor of all of the recent civil penalties levied against companies. In a recent statement, Robinson stated that the following criticisms against the commission’s current approach — the settlement was too high, the CPSC is penalizing a company that made an honest mistake, and too little information was provided to the public on precisely how the CPSC calculated the civil penalty demand — are “unwarranted, misguided and belied by the facts.” According to Robinson, the commission is using an important tool given to it by Congress to do something about those “rare occasions” when the agency determines that a company has failed to report a potentially hazardous product in a timely manner, and is “hardly pursuing an overzealous enforcement agenda.” Commissioner Robinson’s full statement can be found [here](#).

Commissioner Robert Adler

Although Commissioner Adler has not made any official statements regarding civil penalties recently, he has shared some insight of his thinking on civil penalties in prior years. For example, in 2012, Adler voted against a civil penalty agreement with Hewlett-Packard. In a dissenting opinion, Adler stated that the size of the penalty (\$425,000) was “infinitesimal” in relation to the size and revenues of the company. He also rejected the idea that the amount of the penalty could serve as precedent in future cases, specifically citing the new \$15 million civil penalty ceiling authorized in the CPSIA.

Approach of the Agency’s Republican Commissioners

While the Commission’s Republican members, Joe Mohorovic and Ann Marie Buerkle, have some differences in their respective approaches to civil penalties, both have expressed concerns over how the agency calculates, imposes and settles civil penalty demands for alleged violations of CPSC statutes, such as Section 15(b) of the CPSA.

Commissioner Joe Mohorovic

Commissioner Mohorovic has voted for some civil penalties in the past, including Gree, although he has consistently and repeatedly expressed concerns over the way by which the commission seeks and then publicizes such penalties. Recently, Mohorovic voted against the Teavana and Sunbeam civil penalties and issued strongly worded dissents setting forth his perspective on civil penalties in greater detail (see Teavana statement here and Sunbeam statement here).

In the Teavana case, for example, Mohorovic stated that he is “unpersuaded by any of the facts ... that [the] settlement amount is appropriate or that a penalty is justified at all,” and that he believes the commission is “failing in [its] duty to tell people why [it is] imposing the penalty [it is] imposing.” Mohorovic’s perspective could be summarized as follows: settlements of civil penalty demands are teachable moments to educate the regulated community, yet that can only be accomplished through public facing settlement documents that provide sufficient case facts and the commission’s analysis of how those facts are applied to its civil penalty framework. The commission, according to Mohorovic, is not doing so and missing an important opportunity.

Most recently, Mohorovic has asked the commission to add to its annual agenda and priorities hearing some potential elements of a way forward on “what should be our highest priority: the fair, just, and orderly calculation and imposition of civil penalties for alleged violations of our rules.” Such steps include, among others, directing the CPSC’s Office of General Counsel to produce a publicly available report comparing the CPSC’s statutory and regulatory penalty constructs with those of peer agencies and holding one or more open meetings or workshops on “CPSC penalties, their purposes and their ideal function and present dysfunction.” This statement can be found here.

Commissioner Anne Marie Buerkle

Finally, Commissioner Buerkle has been, perhaps, the most strident critic of civil penalties generally and the commission’s approach to pursuing such penalties against firms. According to Buerkle, she does not oppose civil penalties as a “matter of course;” rather, her opposition has “been for a variety of reasons.” From Buerkle’s viewpoint, the defect reporting requirements of Section 15 are vague, civil penalties for failure to immediately report are difficult to evaluate and value, and, like Mohorovic, Buerkle has concerns with the CPSC’s lack of transparency throughout the civil penalty process. Commissioner Buerkle’s recent statement on civil penalties can be found here.

Conclusion

These recent civil penalty settlement agreements illustrate the commission’s desire to increase the amount of penalties assessed against companies for late reporting violations. But they also illustrate another trend: a commission increasingly divided along party lines with respect to civil penalties. This division, however, is not focused on “whether” the agency will impose multimillion dollar civil penalties. At least four commissioners have recently supported multimillion dollar civil penalties in cases where they thought a penalty was warranted. Rather, the major policy divide on civil penalties relates to the role of such penalties in CPSC enforcement, how they are calculated, and the ability of stakeholders to be guided by previous settlements.

Based on the current dynamic, it seems that a robust public debate on the role of civil penalties will continue to unfold at the commission over the next few months. Although this commission has found middle ground more consistently than in recent years, it remains to be seen whether the various sides of the debate will reach a middle ground on these questions. In the meantime, companies should expect the CPSC’s current practices for civil penalties to remain much of the same.

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